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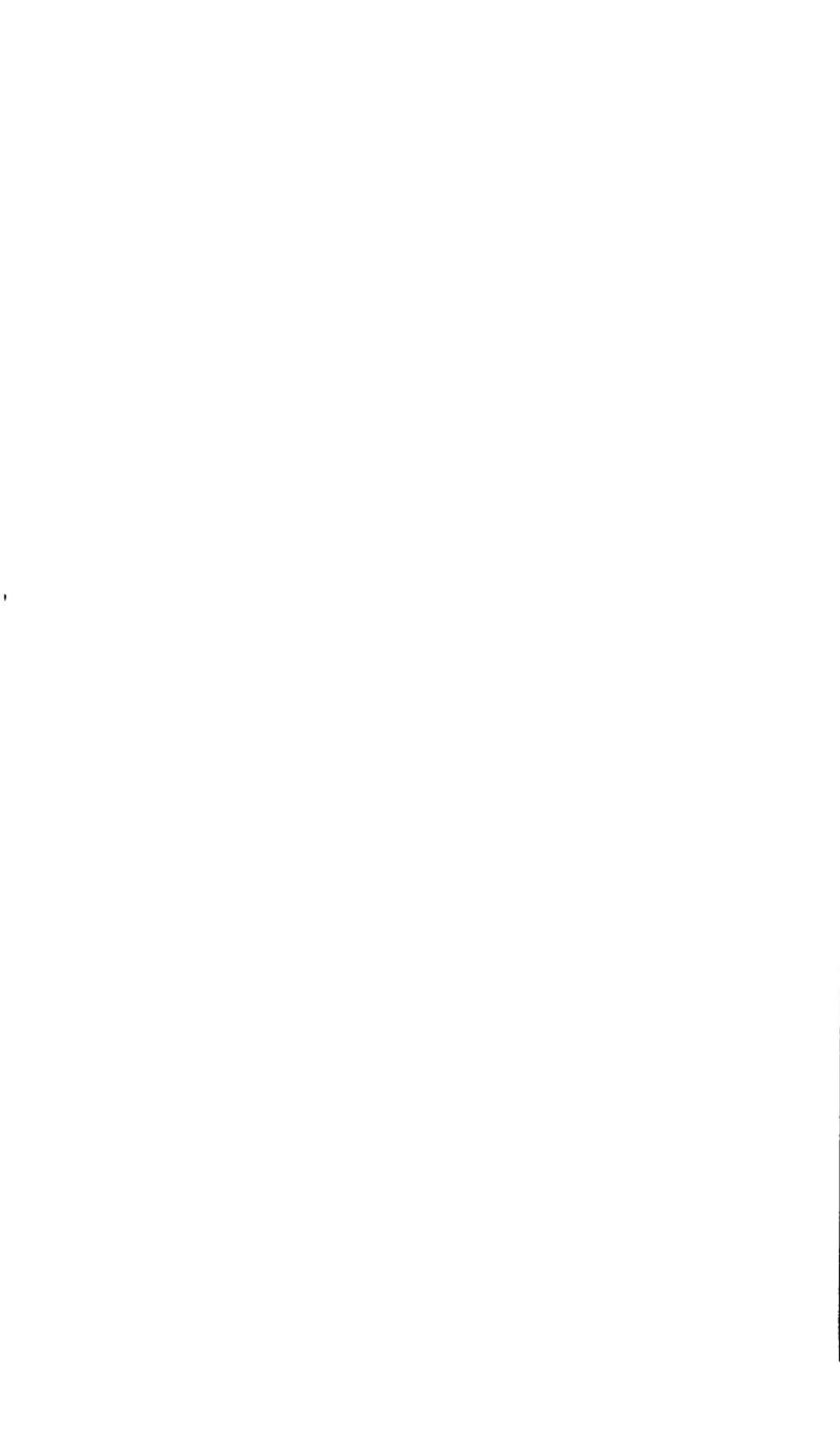
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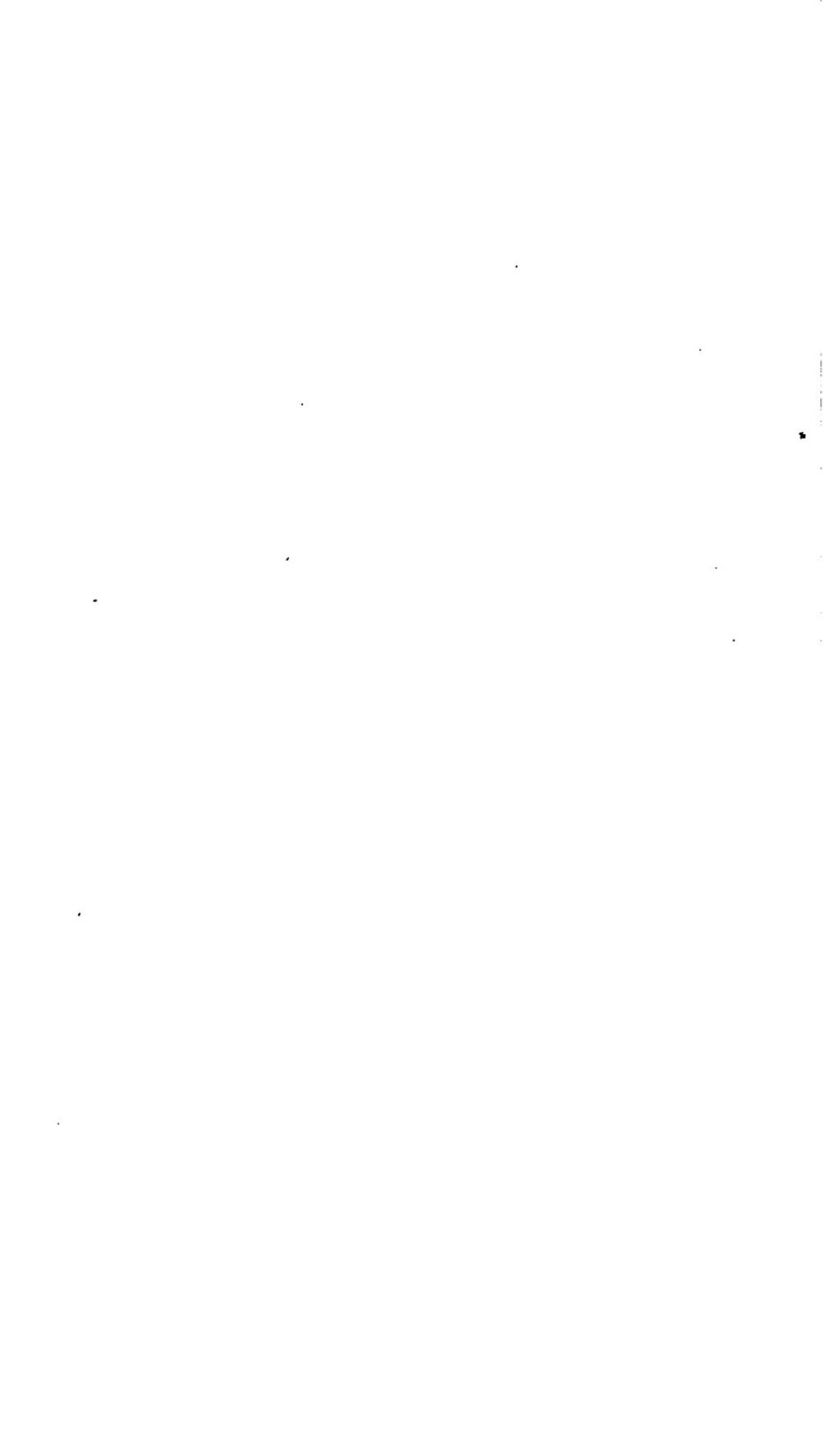
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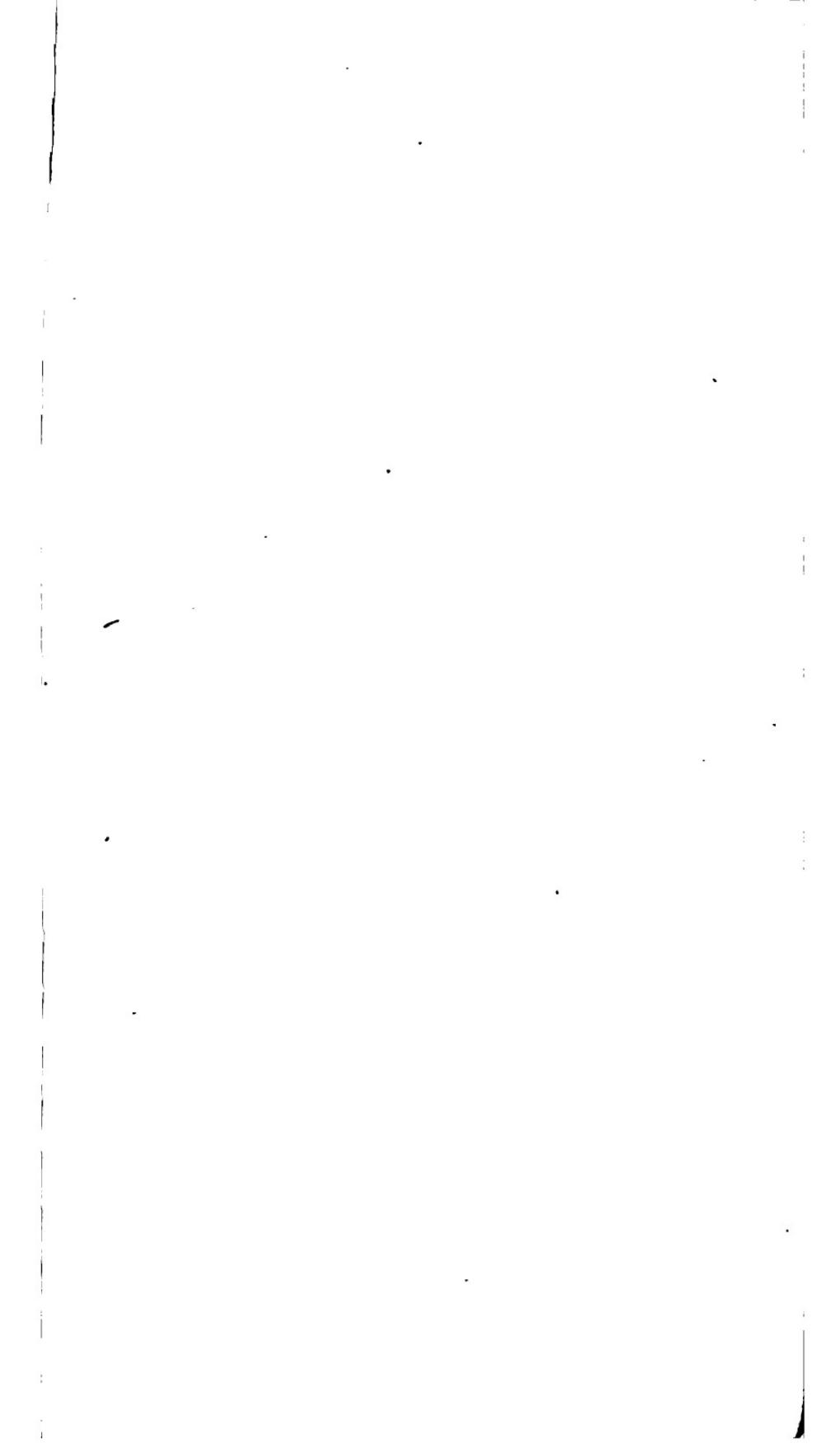
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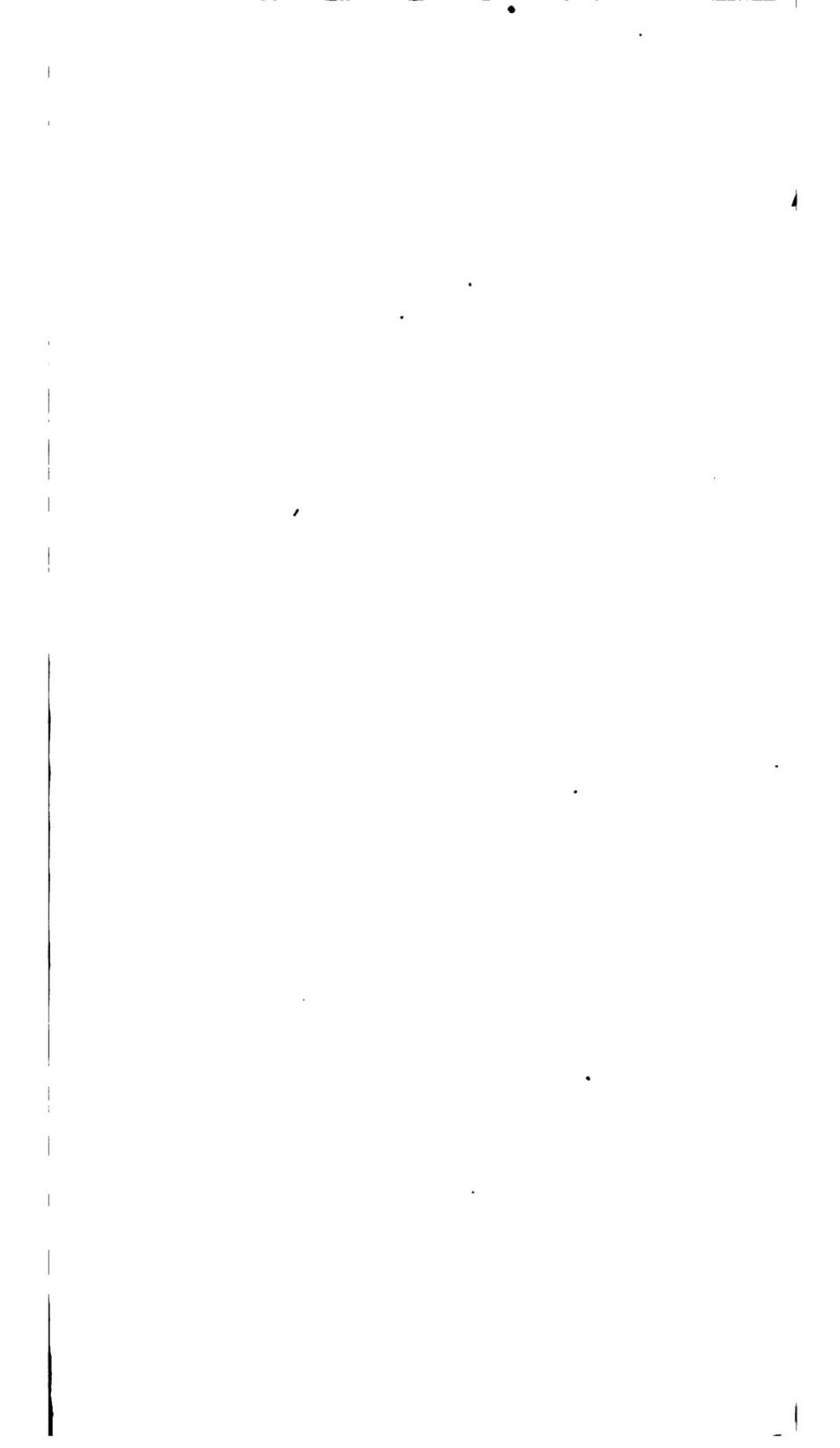




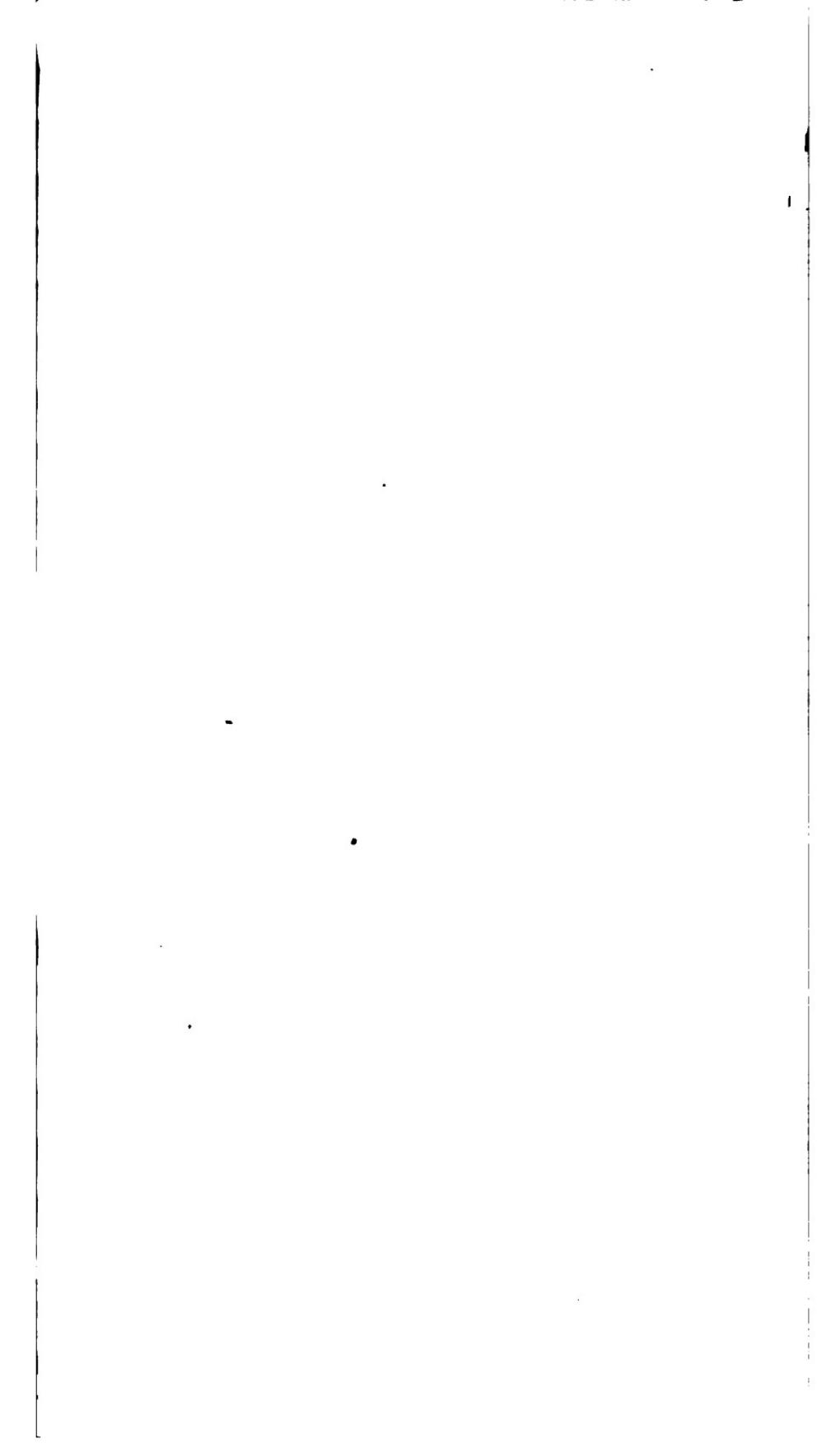












THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ARRANGED

BY A. C. FREEMAN,

ATTORNEY AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGEMENT,"
"CO-MURKIN AND PARKETON," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. LXIII.

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AMERICAN DECISIONS.

VOL. LXIII.

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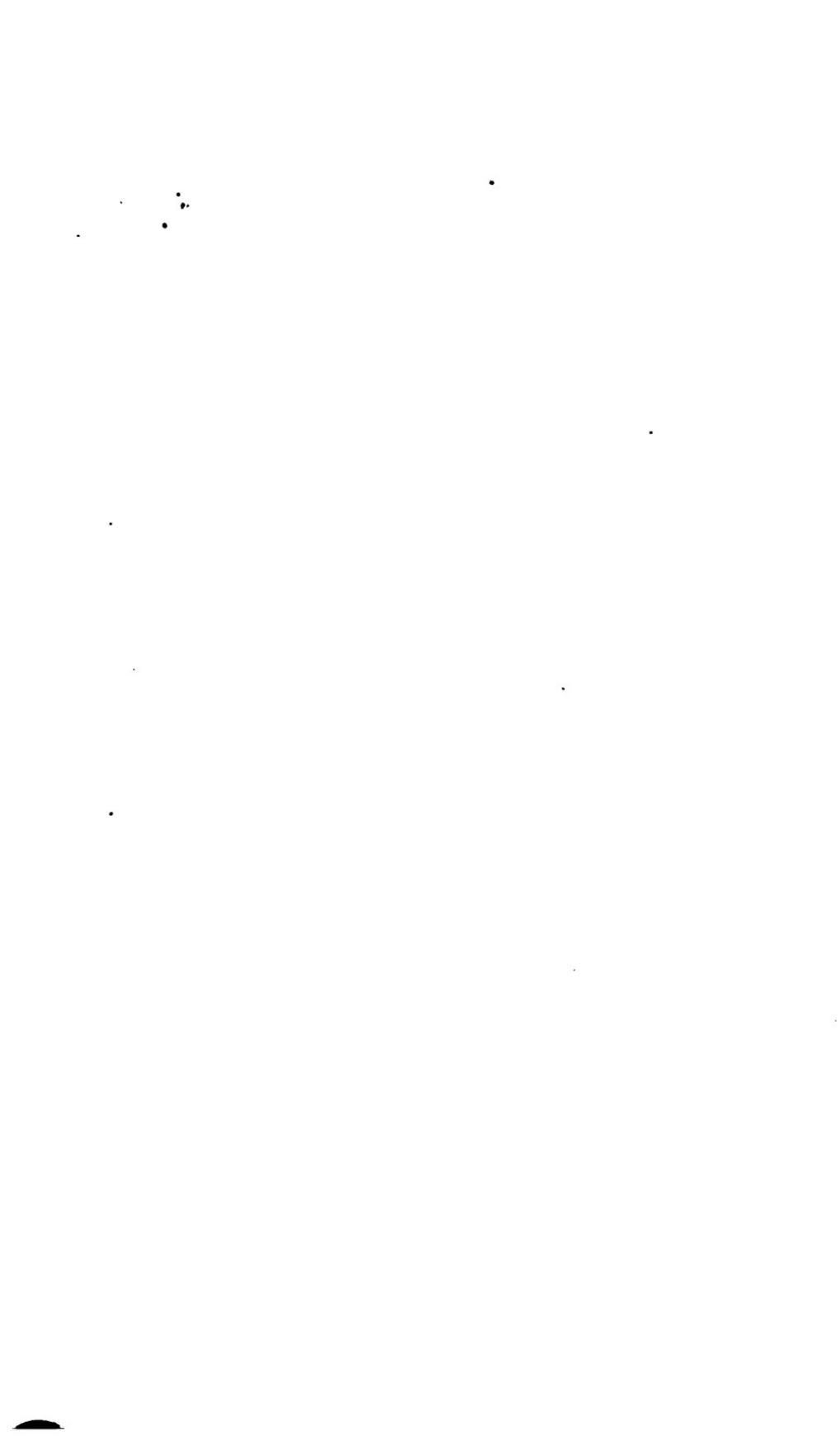
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AMERICAN DECISIONS.
VOL. LXIII.



CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

OVERBY v. McGEE.

[15 ARKANSAS, 459.]

IN EXECUTING WRIT OF ATTACHMENT OR EXECUTION, a sheriff or other officer is, as a general rule, bound at his peril to take the debtor's goods alone; and is guilty of trespass for taking the goods of a stranger, even though assured by the plaintiff in execution that they are the property of the defendant.

OFFICER MAY LEVY UPON GOODS OF DEFENDANT AND THOSE OF THIRD PERSON where they are so mixed as not to be readily distinguished, and only becomes liable to a stranger for levying should he refuse to deliver them to the rightful owner upon request.

OWNER OF PROPERTY LEVIED UPON AND SOLD UNDER WRIT OF ATTACHMENT AGAINST ANOTHER may recover such property from the purchaser, and damages for its detention.

ACTION OF TRESPASS AGAINST OFFICER AND PLAINTIFF IN ATTACHMENT may be maintained, by the owner of property levied upon and sold under a writ of attachment against another, for the taking of the property, although, when the attachment was made, the property was in the defendant debtor's possession as a loan.

APPEAL from Johnson circuit court. The facts are stated in the opinion.

Walker and Green, for the appellants.

By Court, WALKER, J. This is an action of trespass, brought by McGee against Overby, a constable, and others for forcibly taking a mule.

The defendants jointly pleaded the general issue; and the defendant Overby filed special pleas of justification; the first and most material of which was that, as constable, he levied an attachment upon the mule, having found it in the possession of

Biggs, the defendant in attachment, and kept the mule, under and by virtue of his authority, until the return of the writ.

To this plea a demurrer was sustained, and the defendant, refusing to plead over, insists here that the plea is a sufficient justification. It is conceded that if the matter of defense is sufficient, the plea is good in all other respects. The grounds of the defense are, that possession is *prima facie* evidence of title to a chattel, and that *prima facie* title is sufficient to justify the officer in making a levy. It is true that the officer must, in distinguishing the defendant's property from that of a stranger, rely upon the ordinary evidence of title to such property, amongst which are actual possession, use, declarations of ownership, and common reputation. And these, with many others, give evidence, more or less conclusive, of title. It is not to be expected that the officer has personal knowledge of the property owned by the numerous individuals against whom he may have process, or that he can, even upon inquiry, in many instances, get any reliable information; that goods are found in the storehouse of a merchant, or a horse or implement of husbandry in the possession of a farmer, in the absence of any evidence to the contrary, furnish such reasonable presumption of ownership. And the question is, Shall the officer be held justifiable, in the absence of evidence to the contrary, in taking the goods in execution?

The general rule as laid down by the authorities is, that the sheriff, or officer who executes a writ, is bound at his peril to take the debtor's goods alone; and that he is guilty of trespass for taking the goods of a stranger, even though assured by the plaintiff in execution that they are the property of defendant: *Farr v. Newman*, 4 T. R. 633; *Glossop v. Pole*, 3 Mau. & Sel. 175; *Curtis v. Patterson*, 8 Cow. 65; *Haskell v. Sumner*, 1 Pick. 459.

To this general rule there is an exception, to the effect that where the goods of the defendant and a third person are so mixed that they may not be readily distinguished, the officer may levy upon them, and only becomes liable to a stranger for levying should he refuse to deliver them to the rightful owner upon request: *Bond v. Ward*, 7 Mass. 123 [5 Am. Dec. 28].

The reason upon which this distinction rests is commendable for its tendency to encourage the officer in the discharge of his duty, when acting in good faith, by furnishing him protection, at least, until he is advised that there exists an adverse claim to the property; and when viewed practically, the injury likely to

result to the owner, if any indeed, is nominal, because, when the property is not in his possession when the levy is made, as he is not deprived of the immediate possession, no damage is likely to result, on account of the taking in the first instance, to him, much less than to the defendant in execution; for, being possessed of it, the temporary use may be valuable to him. So that it is not until after notice of his claim that the officer should strictly be held to act at his peril.

And when considered in reference to our statute, which provides for a trial of the right of property, after a levy has been made, and before sale, and of the effect which the verdict of the jury has upon the officer's liability, we should strongly incline to hold the officer justifiable, in the first instance, for taking the property in execution.

The statute declares that if any person other than the defendant in execution shall claim the property levied upon, and shall give notice thereof to the officer, such officer may summon a jury to try the right of property; and if the property be found subject to the execution, their verdict shall be an indemnity to the officer in proceeding to sell the property; otherwise, unless indemnified, the officer is not required to sell it.

Now, it is evident that if the effect of the verdict of the jury, finding the property subject to the execution, is to justify the officer in selling it, it must be because he is considered as in the lawful discharge of his duty, up to the trial and verdict as well as after it. Because, if the officer is to be held as a trespasser for making the levy, and up to the time of the trial of the right of property, all the mischief intended to be remedied by the act might arise before the officer could avail himself of the benefit of it. For until after the levy is made, no trial of the right of property can be had. The justification must therefore be complete, extending to the levy as well as the sale. And such is the decision of the supreme court of Kentucky, under a similar statute: *Terril v. Cockeril*, 3 Bibb, 258.

And although the officer may be justified in making a levy upon property found in the defendant's possession, and in the absence of evidence to the contrary, *prima facie* his, it by no means follows that if, upon demand or notice, the officer refuses to restore the property to the true owner he should not be held as a trespasser *ab initio*, as held in *Bond v. Ward*, 7 Mass. 123 [5 Am. Dec. 28]. Nor do we intend to question but that the owner of property, wrongfully taken and converted by an officer, may not pursue and reclaim his property or its value, regardless of

any finding of the jury upon the trial of the right of property, or whether the officer is notified of his title or not. The greatest extent to which either could go would be to relieve the officer from liability as a trespasser in suit in trespass for damages.

But the officer who levies a writ of attachment may with good reason be held to greater strictness in making his levy, because when once made, there is no means by statute for trying the title to the property levied upon, but he must at his peril return it with his writ. And in addition to this, as attachment is a proceeding *in rem*; it is the defendant's property which gives authority to the court to proceed to render judgment and direct a sale. The trial by interpleader, after the return of the writ, it is true, may afford to the claimant some relief, but generally after much delay and expense. In addition to these considerations, it may be remarked that the whole current of adjudicated cases is in favor of holding the officer responsible, at his peril, for levying upon the property of a third person.

The question raised upon demurrer to the second special plea, which sets up in defense a recovery of the mule in an action of replevin from a third person, in bar of a recovery in this suit, was settled by this court when this case was before us upon a former occasion: See *Overby v. McGee*, 12 Ark. 164. The demur-
rer was properly sustained.

Upon the trial under the general issue, the proof was, in substance, that the mule was the property of the plaintiff, a resident of Texas, who loaned it to Riggs, the defendant in attachment, to ride home, with instructions after he got home either to send it back to the plaintiff, if an opportunity should be offered, or keep it until plaintiff came to Arkansas; that the mule was levied upon, and taken from the possession of Riggs whilst on his way, but before he reached home.

The appellants contend that the plaintiff was not entitled to recover in trespass, because in such action the plaintiff must not only show a general property in the chattel, but also possession; and that, although it may be true that the general property carries with it, *prima facie*, a right to immediate possession in most cases, and consequently is equivalent to actual possession, in this case this *prima facie* possession is repelled by evidence that the plaintiff had in fact parted with his right to immediate possession.

It is very true that in some cases the general owner of personal property may neither be in the possession of it nor entitled to the possession of it at the time the trespass is committed;

and it is equally true that when such is the case the general owner cannot maintain trespass for such injury: 1 Ch. Pl. 169; *Hume v. Tufts*, 6 Blackf. 136; as, for instance, where the property is in the hands of a bailee for hire, for a time which had not expired when the trespass was committed. Because, as the general owner in such case has, by contract, vested in the bailee a special property coupled with actual possession, the bailee's right is good even against the general owner for the time being. The inference arising from the general ownership, of possession, is rebutted and only exists in reversion; and consequently, as there is neither actual possession nor a right to possession in the general owner, he cannot maintain trespass. But where the general owner merely permits another gratuitously to use his chattel, such owner may maintain trespass against a stranger for an injury done to it whilst thus held: 1 Ch. Pl. 174.

In the case of *Long v. Bledsoe*, 3 J. J. Marsh. 307, the facts were that the plaintiff loaned his mare to a neighbor, against whom an execution issued, which was by the sheriff levied upon the mare whilst in the possession of the defendant in execution. Under this state of case, the question arose whether the plaintiff, the general owner, was so possessed of the property at the time of the levy as to entitle him to maintain trespass; and it was held "that the possession of the loanees was, in legal contemplation, the possession of the lender."

This decision is directly in point, and is sustained upon this sensible ground, that when the actual possession of goods is in the bailee, and is held by him as a mere gratuity, and not upon contract under which he has acquired rights beneficial to himself, and which he may assert for the time being, even against the general owner, as such gratuitous possession is merely at the sufferance of the general owner, it may at any time be terminated by him, and is considered in legal effect his. So that, upon this ground alone, there was no sufficient ground for granting a new trial.

Finding no error in the judgment and decision of the circuit court, let it be affirmed.

PROPERTY SUBJECT TO ATTACHMENT: *Roby v. Labuzas*, 56 Am. Dec. 237, and citations in note thereto.

ACTION OF TRESPASS MAY BE MAINTAINED, WHEN: *Harrison v. Berkley*, 47 Am. Dec. 578; *Osborn v. Bell*, 49 Id. 275; *McColman v. Wilkes*, 51 Id. 187; *Paul v. Slason*, 54 Id. 759, and references in note 80; *Blaau v. Crocheron*, Id. 203, showing that the liability of trespassers is joint and several; *Wal-*

Lace v. Holly, 58 Id. 518; *Symonds v. Hall*, 59 Id. 53, showing that a sheriff who seizes on execution goods of one not a debtor is a trespasser, and that damages for separate trespass of one of two defendants cannot be included in a joint judgment against both: *Linard v. Crossland*, 60 Id. 213; *Hutchinson v. Lord*, Id. 381.

WHEN LEVY ON PERSONAL PROPERTY AMOUNTS TO SATISFACTION OF JUDGEMENT: *Trapnell v. Richardson*, 58 Am. Dec. 338, and extended note thereto 350, on satisfaction of judgments and executions by levy on real estate or personal property.

SNIDER v. GREATHOUSE.

[16 ARKANSAS, 72.]

SURETY MAY MAINTAIN ACTION AGAINST HIS PRINCIPAL FOR MONEY PAID, where the surety has paid a debt on default of his principal; and this on the ground that defendant's assent is implied in all cases where the plaintiff is under a legal obligation to pay the money through the default of another.

WHEN TRANSCRIPT OF RECORD IS ADMISSIBLE IN EVIDENCE.—The record of proceedings against an administrator and his sureties in one state, instituted by one of the distributees of an estate for his distributive share, had without notice to the administrator, and which resulted in a decree against the heirs of a deceased surety for their proportional part of the sum due, and followed by supplementary proceedings in execution returned satisfied, is invalid as the foundation of an action, in a sister state, against the administrator, for want of notice; but it is admissible in an action against him by the heirs for money paid, as *prima facie* evidence of the sum due by the administrator, of the obligation of the heirs to pay, of the assent of the administrator to the payment, and of the actual payment of the money.

SEVERAL HEIRS OF DECEASED SURETY CAN MAINTAIN JOINT ACTION AGAINST PRINCIPAL DEBTOR for money paid by them in satisfaction of a joint judgment rendered against such heirs.

APPEAL from the circuit court of Crawford county. The facts are stated in the opinion.

Walker and Green, for the appellant.

By Court, WALKER, J. The facts necessary to a proper determination of the questions of law in this case are, that Frederick Snider, of Hancock county, Kentucky, died intestate, and that Nicholas V. Board and Cornelius Snider were appointed administrators of his estate, and executed bond for the faithful performance of their duties as such administrators, with Rodolphus B. Greathouse and Henry W. Williams as their sureties.

Thereafter, Cornelius Snider resigned his administration, and by an order of the county court of said county, Board,

the other administrator, executed another bond for the faithful performance of his duties, with Philomon Dawson, John Wood, and Robert C. Beauchamp as his sureties.

Subsequently, Robert C. Beauchamp, who was appointed guardian for the heirs of Frederick Snider, filed a bill in chancery in the Hancock circuit court, in Kentucky, against Cornelius Snider Nicholas V. Board, and their securities, for an account for money alleged to be due, upon the settlement of the administration, to the heirs of Frederick Snider, deceased.

At the time this suit was commenced, both the administrators had removed from the state of Kentucky, and no personal service of notice of the suit was had upon them, nor did they appear to the action. After personal service upon the securities, and constructive notice by publication upon the administrators, such proceedings were had that a decree was rendered against John L. Greathouse, William L. Greathouse, Joseph L. Greathouse, and Isaac N. Greathouse, heirs of Rodolphus B. Greathouse, one of the sureties on the administration bond, for the sum of one hundred and fifty-seven dollars and fifty-two cents, their proportional part of the whole sum due by the sureties and decreed to be paid, with a like proportion of the costs.

Upon this decree an execution issued against the defendants, heirs of Rodolphus B. Greathouse; and under the statute of Kentucky the debt was replevied, with William S. Bates as security in the replevin bond, said bond having the force and effect of a judgment; execution issued thereon on the fourth day of October, 1850, against said defendants, and Bates, their security, which, as appears from the sheriff's return, was levied upon a negro, the property of John H. Greathouse. The return shows no disposition of the slave, and from the fact that within five days after the levy the execution was returned, indorsed "satisfied in full," it is fair to presume that it was not satisfied by the sale of the negro, but by whom it does not appear; nor is it shown, in the receipt of the complainant Beauchamp, who acknowledges the receipt of the full amount of the debt, by whom the money was paid.

To recover this money paid as security for the administrators under this decree, the heirs of Greathouse, the security upon the bond, brought this action in *assumpsit* in the Crawford circuit court, against Cornelius Snider and Nicholas V. Board. The declaration contains the usual money counts. The action was discontinued as to Board, who was not served with process.

Cornelius Snider pleaded the general issue and the statute of limitation, upon which issue was taken, and the case submitted to the court sitting as a jury—the transcript of the record from Kentucky being the only evidence adduced. Judgment was rendered for the plaintiffs. The defendant moved for a new trial, upon the ground that the evidence was not sufficient to sustain the finding of the court in favor of the plaintiffs. The motion was overruled, and the defendant excepted and appealed.

The main question presented is, Is the transcript of the record from Kentucky sufficient evidence to fix upon the defendant a legal liability to the plaintiffs for the sum of money claimed to have been paid by them, on account of the securityship of their father, for the defendant?

The objection to the admissibility of the record, or rather of the extent to which it may be used, and to fix the liability of the defendant to pay, is, that the decree was rendered upon the bond without actual notice to the defendant, he being at the time the suit was commenced a non-resident of the state of Kentucky; and it is also contended that, giving the record the full force and effect contended for by the plaintiffs, still it does not show a joint payment of the money by them; and consequently, no joint right of action against the defendant.

To entitle the plaintiffs to recover, they were required to prove the payment of the money by them, and an express or implied assent on the part of the defendant to such payment. In this case there was an implied assent growing out of the legal liability of the security to pay.

Starkie says: "The defendant's assent is implied in all cases where the plaintiff is under a legal obligation to pay the money through the default of another; as when a security is compelled to pay money on the default of his principal:" 2 Stark. Ev. 101.

To establish the implied assent to the payment, and also to show what amount the security was required to pay, the transcript of the record was introduced, as well as to show by the return of process that the money was paid. The bonds, the amount of the estate which came to the defendant's hands, and the balance due them, as well as the decree, the execution, and the return showing that it had been paid, all appear in the transcript. But the defendant objects that it is not evidence against him, because he was not, by actual service, made a party to the suit.

If the action had been debt upon the record, the objection would have been good, as held by this court at the present term.

in *Iglehart v. Moore*, 16 Ark. 46. But as the suit was *assumpsit*, and the sole purpose of the record was to show an implied assent growing out of the legal obligation to pay the money which had been paid as security, through the default of the principal to pay, the question is, Does the same rule apply as if the suit had been upon the judgment? We think not. It is very evident that the security might have been sued alone upon this bond. Such was held to be the case in *People v. Miller*, 1 Scam. 83.

In such suit the court determines the liability of the security to pay; the breach is for the non-performance of the duty of the administrator; the damages, the sum ascertained to be paid. No doubt but that this sum may be coerced by law from the security; and shall we say that if it imposes a legal obligation upon him to pay the debt of his principal, it is not sufficient evidence to raise an implied assent to such payment, and an *assumpsit* to refund the money so paid to the security? We should say not; nor do the decisions cited and relied upon by the counsel for the defendant, when properly restricted to the state of facts under which the decisions were made, deny the validity of the record for such purpose.

In the leading case, *Maupin v. Compton*, 3 Bibb, 214, Compton, the assignee, brought suit in Virginia against Ellis, the maker of the note; and upon the trial of the case, the jury found that the debt had been paid to Maupin, the assignor, before he assigned the note to Compton, and judgment was rendered in favor of Ellis. Compton then sued Maupin, the assignor. On the trial of this suit, the only evidence introduced was the transcript of the record of the suit between Compton and Ellis in Virginia; of which suit, however, Maupin, the assignor, had no notice; the question arose upon the admissibility of the record as evidence. The court said: "In the present case, no suit was necessary against the obligor (if the demand was paid before the assignment) to authorize a recovery against Maupin, the assignor. The cause of action accrued virtually upon the assignment being made; nor was the fact of payment matter of record, but extraneous from it. The same necessity does not, therefore, exist in this that did in the former case, to make the record evidence."

It will readily be perceived that the record was excluded as evidence in this case because, the payment having been made to Maupin before the assignment, a right of action accrued at the time the assignment was made, wholly independent of the determination of the suit in Virginia. But in the case before us,

the obligation to pay, on the part of the principal, arose upon the assessment of the damages by reason of the breach of the condition of his bond, and the payment of the money for him by his securities.

There is another class of cases, in which notice has been held necessary in order to make the record evidence sufficient to entitle the plaintiff to recover, relied upon as authority. They are where suit is brought upon the warranty of title upon eviction by a paramount title. The decisions go to the extent that the record of the eviction is sufficient evidence of an eviction, whether the grantor had notice of the suit under which the eviction was had or not, but not of paramount title. In both these classes of cases the legal liability upon the assignor and the grantor are contingent, and arise solely upon the contingency that the money cannot be made out of the payor, or that the grantee has been evicted by a paramount title.

But the liability of the security upon the bond is joint and several, and although he cannot have his recourse over against his principal until he has paid the debt, still he is liable over to the creditor in the first instance; and upon the payment of the debt after it becomes due, if it is liquidated, or after its liquidation, if not so, according to the terms of the contract, whether by process of law or not, an obligation is raised to pay the same. Suppose the bond had been for the payment of a specific sum of money; after the bond fell due an obligation would rest both on the principal and the security to pay, and the security might do so without suit. In that event he would have to prove the execution of the bond, by which he became security for the defendant, and the payment of the money to the obligee. But where the obligation was to perform a duty, upon a failure to do which a legal liability accrued in damages for a breach of duty, if the security should undertake to pay what might be claimed as damages without a suit, we presume he would do so at his peril, and would be required, in a suit against the principal, not only to show that he was security upon the bond, but also that the damages were really due. When sued, however, and his liability and character as security brought into question, as well as the amount which he shall be required to pay, it would seem but just that the record evidence, which was held sufficient to impose a legal liability on him to pay, and his actual payment under the process of the court, would, if not conclusive, at least be *prima facie* evidence of his liability to pay, and that he was such security. Suppose the principal be dead, with no legal

representative, or that he has absconded to parts unknown, and his security has been sued and made to pay his debt, if we were to hold that the security could not hold his estate liable upon the recovery had against him as security, he would not only be required to prove that he had paid the money, but also that the damages assessed were properly due and chargeable. The result would be that these facts must again be submitted for re-investigation to some other court or jury, who, under a new or different state of facts arising upon the evidences then adduced, might determine that the principal was chargeable with a less sum than that recovered against him, and if he is to be bound by this, the security would, in good faith, under the judgment of the court, be compelled to pay money which he could never recover from his delinquent principal. In view of the equitable nature of the demand of a security against his principal for money paid, we cannot hold such to be the law, and in support of the conclusions at which we have arrived upon principle there are several adjudged cases to which we will briefly refer.

In *Scott v. Cleveland*, 3 T. B. Mon. 62, it was held, in an action of *assumpsit* by the assignee of a note against the assignor, that the transcript of a judgment, rendered in the state of Indiana, in favor of the maker, was admissible evidence in a suit against the assignor.

In *Barr v. Gratz*, 4 Wheat. 213, Judge Story takes the distinction between the admissibility of the record when the right claimed is founded upon the record recovery, and when introduced as part of a chain of evidence in the case. He says: "It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title."

And Mr. Greenleaf, in his work on evidence, says: "A judgment when used by way of inducement, or to establish a collateral fact, may be admitted, though the parties are not the same. Thus, the record of a conviction may be shown in order to prove the legal infamy of a witness; so it may be shown in order to let in the proof of what was sworn at the trial, or to justify the proceedings in execution of the judgment. So it may be used to show that the suit was determined, or, in proper cases, to prove the amount which a principal has been compelled to pay for the default of his agent, or the amount which a surety has been compelled to pay for the principal debtor;

and, in general, to show the fact that the judgment was actually rendered at such a time, and for such amount:" 1 Greenl. Ev. 527.

These authorities clearly show that the record is admissible for such purpose, without reference to the fact as to whether it should be considered as conclusive or only *prima facie*; probably the latter, as would appear from several decisions directly in point. *Hagerthy v. Bradford*, 9 Ala. 571, was a suit in *assumpsit* by the indorsee against the indorser, after a failure to recover of the maker of the note, the assignor having had no notice of the suit against the maker. Goldthwaite, J., after considering the question in cases where notice has been given to the assignor, proceeds: "But what is the rule when no notice has been given? In *Scales v. Wilson*, 9 Leigh, 478, the assignee of a bond in Virginia submitted his action against the obligor to arbitration, and it was awarded in favor of the obligor, on account of set-offs against the assignor. On a suit against the assignor, he insisted that he was not bound by the judgment on the arbitration, but the court held it was *prima facie* obligatory upon him. In *Train v. Gold*, 5 Pick. 380, one not connected with a suit had undertaken to indemnify an officer for a levy, and he was held *prima facie* bound by a judgment against the officer, although obtained without notice to the indemnitor. These cases," says the judge, "will authorize us in the conclusion that the judgment in favor of the maker, upon the merits of the note, is in all cases *prima facie* evidence against the indorser, and that it rests with him to show the defense then interposed was invalid."

In the case of *State v. Colerick*, 3 Ohio, 488, the court said: "We take the distinction to be, that where the securities have notice of the suit, and may or do make defense, the judgment against the principal is conclusive against them. When such notice is not given, the judgment against the principal is *prima facie* only. It may be impeached for collusion or mistake; but until so impeached, it is sufficient to entitle the plaintiff to recover the amount for which it is rendered."

In *Cobb v. Haynes*, 8 B. Mon. 187, the precise question came up that is presented in this case. It was a suit in Kentucky to recover part of the sum paid by another security, who had been sued and compelled to pay the whole amount decreed to be due from the administrator to the heirs of the intestate. The first question was whether the record was evidence that the defendant was a co-security upon the administration bond with the

complainant, and it was held that the copy of a record from a court in Virginia, properly certified and containing a copy of the bond, purporting to be signed by the defendant, and not denied otherwise than by stating his want of recollection that he had ever signed it, should be taken as conclusive evidence of the fact of his signature, and touching the effect of the judgment upon the rights of the parties. It was further held that the record was evidence of the pendency of the suit in Virginia, and the decree thereon rendered is *prima facie* evidence of the extent of the liability of the co-security, and of the liability of the party sued in Kentucky as co-security in the administration.

The record in the case before us contains a copy of the bond and all the proceedings in the administration; and was, in our opinion, *prima facie* at least, sufficient evidence of the sum found due by the defendant as such administrator, and which the plaintiffs, as securities, were required to pay. And also of every other fact necessary to raise an implied assent, on the part of the defendant, to the payment made by the plaintiffs; and we are further of opinion that the process of execution, and the return and receipts upon it, sufficiently show the actual payment of the money.

The remaining question to be considered is, whether such payment was a joint payment, or such as will entitle the plaintiffs to maintain a joint action for the sum paid.

These plaintiffs were the heirs of Rodolphus B. Greathouse. Their liability to pay arose upon the fact, we must presume, that his estate came into their hands; otherwise they would not have been responsible. It was their joint debt, then, as his heirs. The judgment was against them, and although the execution also issued against their security in the replevin bond, it is but just to presume that the money was paid by the principals, and as they were jointly liable that it was a joint payment. Chief Justice Savage, in *Gould v. Gould*, 8 Cow. 170, remarks: "It is nothing to the defendants whether the funds out of which the debt was paid be joint as between securities, or several as to each. That is the concern of those only who own the fund."

And the doctrine laid down in *Littler v. Horsey*, 2 Ohio, 211, and in *Appleton v. Bascom*, 3 Met. 169, sustains this view of the question, and shows that the objection is not well taken.

This question comes up upon exceptions to the opinion of the court upon motion for a new trial; and upon a fair considera-

tion of the whole case, we think substantial justice has been done.

Affirmed.

SCOTT, J., absent.

SURETY MAY MAINTAIN ACTION AGAINST HIS PRINCIPAL, WHEN: *Bowman v. Robinson*, 58 Am. Dec. 117; surety having satisfied judgment which his principal was legally bound to pay is entitled to recover judgment against him: *Pike v. McDonald*, 54 Id. 597, and authorities cited in note 598; sureties jointly paying judgment against them may sue jointly, in equity, the heirs of a deceased co-surety for contribution: *Fletcher v. Jackson*, 56 Id. 98, and notes thereto 107.

ADMISSIBILITY OF RECORDS IN EVIDENCE.—Transcripts from sister states: *McCravy v. Remon*, 54 Am. Dec. 194; *Donaldson v. Phillips*, 55 Id. 614; *Slaughter v. Cunningham*, 60 Id. 463, and references to collected cases in note 469. And in the same state, see *Kean v. Holloway*, 50 Id. 162; *Stringer v. Jacobs*, Id. 221; *Lynch v. Baxter*, 51 Id. 735; *Johnson v. Jennings*, 60 Id. 323; *Snodgrass v. Branch Bank*, Id. 505.

CUNNINGHAM v. ASHLEY.

[16 ARKANSAS, 181.]

WHERE APPELLATE COURT REVERSES DECREE AND REMANDS CAUSE to the lower court for further proceedings, that court can only carry into effect the mandate of the appellate court so far as its direction extends; but the lower court is left free to make any order or direction in the further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision.

IN SUIT BEFORE APPELLATE COURT TO RECOVER LAND OF WHICH CLAIMANT HAS BEEN DISSEISSED, a recovery is necessarily followed by the resulting consequence of a right to the rents and profits of the land during the wrongful and fraudulent disseisin of the complainant; and no express claim to rents and profits need be set up in the bill, as no distinct issue can be taken upon it; but they may be recovered in the court below, under the general prayer of relief.

BILL in equity to recover the possession of certain land, and the rents and profits thereof. The facts are stated in the opinion.

By Court, WALKER, J. This case came before us at the last term of the court upon cross-appeals, and an opinion was then delivered. After which, upon petition of the defendants, a re-consideration was granted to that part of the opinion which decided the questions of law arising upon the appeal of Cunningham's heirs.

The questions of law arising upon the appeal of the complainants from the decision of the court grew out of a motion,

made by complainants at the time of taking their final decree for the land, for a reference to the master to take an account of the rents and profits on the land, and to report. This motion was overruled, upon the ground that the allegations in the bill had not laid the proper basis for such account. From which decision the complainants appealed.

Preliminary to this, the question was made by counsel, whether, as this court in its directions to the circuit court, when the case was before us upon a former appeal, made no reference of the question of rents and profits, that court, upon the return of the cause for further proceedings in conformity with the opinion of this court, could do more than to carry into effect the specific decree indicated in the mandate to that court.

We think it very well settled that the circuit court could not, so far as the direction extended; but the question of rents and profits was not then presented for our consideration; no question of law was either discussed or settled with regard to it; and consequently the circuit court was left free to make any order or direction in the further progress of the case not inconsistent with the decision and direction of this court.

The allegations in the complainant's bill are not very full and distinct with regard to the extent of the adverse possession held by the defendants, and there is no distinct claim set up by the complainants, in their bill, to rents and profits; nor is there any specific prayer for relief touching the same. So that unless rents and profits result necessarily from the decision of the court upon the allegations of a fraudulent and wrongful disseisin in favor of the complainants, and could become the subject of litigation and contest, notwithstanding a decision in favor of the complainants as to the title and the wrongful disseisin, in order to entitle the complainants to recover, it would become necessary to make a distinct averment and claim to rents and profits which might be decreed under the general as well as under a specific prayer for relief. And the whole question seems to be narrowed down to this inquiry.

The question then is, What is the legal effect of a claim to land of which the claimant has been disseised? This question has been answered by several decisions, fully in point, to which we will refer.

In *Green v. Biddle*, 8 Wheat. 1, it was held that at common law, whoever takes and holds possession of land to which another has a better title, whether he be a *bona fide* or a *mala fide* possessor, is liable to the true owner for all rents and profits

which he has received; but the disseisor, if he is a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim for damages. That equity allows an account for rent in all cases from the time the title accrued (provided it does not exceed six years), unless under special circumstances, as where the defendant had no notice of the plaintiff's title, or where there has been laches in the plaintiff in not asserting his title, etc., in which and similar cases the account for rents is confined to the time of filing the bill; and the court concludes this branch of the case by saying: "A right to land essentially implies a right to the profits accruing from it, since without the latter the former can be of no value. Thus a devise of the profits of land, or even a grant of them, will pass a right to the land itself: Shep. Touch. 93; Co. Lit. 4. 'For what,' says Lord Coke, 'is the land but the profits thereof?'"

And so this court held in *Watkins v. Wassell*, 15 Ark. 92, that "a grant of rents and profits entitled the purchaser to enter upon and take possession of the land itself." In *Emerson v. Thompson*, 2 Pick. 487, it was held that the right to mesne profits was a necessary consequence to a recovery of the estate.

And Lord Eldon said, in *Pulteney v. Warren*, 6 Ves. 87: "When the decree for title or judgment in ejectment is obtained, the plaintiff has all natural justice on his side, both in law and equity, to the possession from the moment he made the demand, and if so, the mesne profits are consequential upon his obtaining possession."

These authorities show conclusively that the right to the rents and profits of the land necessarily follows the recovery as a consequence resulting from it; and if that be the case, it is very evident that no express claim to rents need be set up in the bill; nor, indeed, can any question arise with regard to rents that might not as well arise with regard to interest upon the rendition of a judgment. When a contract is proved and judgment rendered upon it, the law, as a consequence, without any averment or demand for interest, gives the right to take judgment for interest for the detention of the debt. And so in a suit to recover real estate, when it is ascertained that the plaintiff has been disseised of his freehold by the defendant, and that the land is the plaintiff's, the law fixes the right to rents and profits for the detention and use of the land, as it does for the detention of money due upon a contract. In the latter case the law fixes the rate of interest; in the first, the value of the rents and

profits is left to be ascertained by evidence upon an inquiry for that purpose, having regard to the length of time, the value of the property, and perhaps, where the occupant is *bona fide* such, to recoup the value of improvements against damages for rents.

The point of analogy between the case of a judgment in debt and in ejectment, for which we contend, is this: that when the act of indebtedness is ascertained, the right to interest follows without an averment that it is claimed; and, upon the like principle, when the right to the land and the disseisin are settled, rents and profits for the use of the same are recoverable, as incident to the determination of the right to the land.

There was, therefore, in our opinion, no necessity for a specific allegation in the bill for rents and profits; no distinct issue could have been taken upon it; and whether the question should be considered before the court upon allegations and proof, or before the master, the only question would be the nature of the tenancy, the length of time it was held adversely, and the value of the improvements. These facts being ascertained, the court would determine, upon application of the law arising upon them, what decree it should render, and under the prayer for general relief decree accordingly.

The case of *Dormer v. Fortesque*, 8 Atk. 124, was not so clear a case as this. In that case the bill was filed for the discovery of a deed, under which Dormer claimed, and that the same might be forthcoming on the trial at law of an action of ejectment, and for general relief. Nothing was said about rents; it was not even a suit for the recovery of land; but to discover the title papers to land. The plaintiff subsequently obtained judgment in ejectment, and a supplemental bill was filed to recover rents and profits. Lord Hardwicke said in that case that, the supplemental bill aside, the original bill was sufficient, "and extended to everything then insisted upon by the plaintiffs, and that he ought not to confine them to the single matter of producing the deeds upon the trial." And the counsel, throughout the argument of that case, conceded that if the bill had been to recover the land, and not to discover the title deed, the right to recover the rents and profits would have been clear; but only contended that, as such was not the scope and object of the bill, the rents and profits were not recoverable in that suit under the prayer for general relief.

We are satisfied, therefore, that the motion to refer the matter of account for rents to the master should have prevailed, and for this error, the judgment and decision of the circuit

court must be reversed, and the cause be remanded, with instructions to entertain the motion and refer the matter of account for rents and profits to the master.

ENGLISH, C. J., not sitting.

GRIMMETT v. WITHERINGTON.

[16 ARKANSAS, 377.]

DOMICILE OF FATHER IS, in legal contemplation, the domicile of his minor children.

IF FATHER IS DOMICILED AND DIES IN ONE STATE, and a guardian, lawfully entitled to the care and custody of his minor children, is there appointed for them, they cannot legally change their domicile to another state, so as to divest their guardian of their care and custody.

IF MINOR CHILDREN OF DECEASED FATHER DOMICILED IN ANOTHER STATE AT TIME OF HIS DEATH remove from that state to another, and a foreign guardian is appointed in the latter for them, such foreign guardian, without proof that the minors were legally domiciled in the state to which they have removed, cannot recover their property from the domestic guardian, nor the distributive share of their father's estate from his administrators.

LEGISLATIVE ENACTMENTS MAY EMPOWER COURT to order a domestic administrator, having in his hands the distributive share of an estate belonging to minor children legally domiciled in a foreign state, to pay the same over to the foreign guardian appointed for the minors in such state.

APPEAL from the circuit court of Union county. The opinion states the facts.

Hardy and Carleton, for the appellants.

Lyon, for the appellees.

By Court, ENGLISH, C. J. In October, 1853, Maclin Grimmett filed a petition in the probate court of Union county, representing that he had been appointed by the county court of Jasper county, in the state of Texas, guardian of Newton S., Alvin M., Lucetta C., and Henrietta R. Witherington, minor heirs of James Witherington, deceased, who died intestate in said county of Union; that he, the petitioner, was the husband of Catherine L., daughter of said James Witherington; that Augustus L. Witherington and William A. Ring were the administrators of said James Witherington, deceased; that the remaining heirs of said James Witherington were four married daughters, whose names and the names of whose husbands are stated; that several of the heirs had received from their

deceased father certain sums by way of advancement, which are set forth; that the debts of the deceased had been paid, and that upon the last settlement of the administrators with said probate court there remained a balance in their hands of six thousand and forty-seven dollars and thirty-five cents. Prayer, that the court order the administrators to pay over to the petitioner the amount due him as such guardian, and also the sum due to him in right of his wife, Catherine L.

The petitioner accompanied his petition with a duly certified transcript of the record of the county court of Jasper county, in the state of Texas, showing his appointment as guardian of said minor heirs.

From this transcript it appears that on the thirtieth of August, 1852, Grimmett presented his petition to said county court of Jasper county, Texas, praying to be appointed guardian of the persons and estates of Alvin M., Lucetta C., and Henrietta R. Witherington, minors and heirs of James Witherington, deceased; and it appearing to the satisfaction of the court that said minors were under the age of fourteen years, and legal notice of said application having been given, and there being no exceptions to the petition, it was ordered by the court that Grimmett be appointed guardian of the persons and estates of said minors, on his entering into bond, with good and sufficient securities, in the sum of six thousand dollars, for the faithful performance of his duties, etc. Whereupon Grimmett executed the bond required, which was approved; he also made the affidavit required, and the court ordered letters of guardianship to be issued to him.

It further appears from the transcript that on the same day Newton S. Witherington, a minor, over the age of fourteen years, appeared before said county court of Jasper county, and made choice of Grimmett as guardian of his person and estate; and upon Grimmett entering into bond, and making the affidavit required, he was appointed guardian of said Newton S., and letters ordered to be issued to him accordingly.

On the hearing of the cause in the probate court of Union county, the court rendered the following decree: "Came Maclin Grimmett, in the right, and as guardian, etc., and presented his petition, praying an order of distribution of said estate, and an order authorizing him to remove the portion of said minor heirs, etc., that should be adjudged to them in said distribution, to the county of Jasper, in the state of Texas, and thereupon filed and exhibited in open court a regularly certified

transcript of his appointment and qualification as guardian of said minors, in the county and state aforesaid, where said minor heirs reside: whereupon, John C. Ring, as domestic guardian of said minors, appeared in open court and consented that an order and decree of this court should be entered according to the prayer of petitioner; but said Augustus L. Witherington, one of said administrators, objected to the right and authority of petitioner to sue as foreign guardian of said minor heirs, because the said John C. Ring is their regularly appointed guardian in this state; and after argument of counsel, the court finds that petitioner's right and authority to prosecute this suit in right of his wife, and as foreign guardian of Newton S. Witherington, is sufficient; and it appearing that under a former order of this court the slaves belonging to said estate were ordered to be sold for the purpose of distribution, etc., and that the proceeds of sale, etc., amount to the sum of," etc.

The decree then proceeds to state the sum to be distributed, and the amount ascertained by the admissions of the parties to have been received by the married daughters by way of advancement, and orders the administrator to pay over, for the benefit of each distributee, the share of the fund ascertained to be due to him or her. And particularly, that they pay over to Grimmett, in right of his wife, the sum allotted to her; and also that they pay over to him, as foreign guardian of Newton S. Witherington, the portion of the fund due to him, and that he have privilege, as such guardian, to remove the same to Jasper county, Texas.

But it was further decreed that the administrators pay over to John C. Ring, as domestic guardian of the minor heirs, Lucetta C., Alvin M., and Henrietta R. Witherington, the portions of the fund distributed to them; and Grimmett excepted to so much of the decree as withheld from him, as such foreign guardian, the shares of these three minors, and took a bill of exceptions setting out the evidence.

It does not appear from the bill of exceptions that any evidence was introduced upon the hearing but the transcript showing the appointment of Grimmett as guardian of said minor heirs in Texas; the account current of the administrators showing the balance in their hands, and the proceedings for the sale of the slaves for distribution; together with the admissions of the parties in reference to the sums received by the heirs to whom advancements had been made.

Grimmett appealed from the decree of the probate court to

the circuit court of Union county; where, on inspection of the transcript, the decree was affirmed, and he appealed to this court.

It is insisted for the appellant, that under the act of the twelfth of January, 1853, Pamph. Acts 1852-3, p. 206, he had the right to recover and remove to Texas the money due his wards from the estate of their father, and that the probate court should have so decreed. On the other hand, it is contended for the appellees that the domestic guardian had the preference to receive and retain the money in his hands.

It may be fairly inferred from the record that James Witherington was domiciled and died in Union county, Arkansas; that the probate court of said county granted letters of administration to two of the appellees upon his estate, and appointed the other appellee, Ring, guardian of his minor children, who, it may be legally supposed, were also at the time domiciled in Union county, the domicile of the father being, as a general rule, the domicile of his minor children, according to law. How or by what authority these minors got into Texas does not appear from the record.

By the common law, a foreign guardian can exercise, as such, no rights or powers or functions over the property, personal or real, of his ward, which is situated in a different state or country from that in which he has obtained his letters of guardianship. But he must obtain new letters of guardianship from the local tribunals authorized to grant the same before he can exercise any rights, powers, or functions over the same: Story's *Conf. L.*, 2d ed., secs. 499, 504 a; *Kraft v. Wickey*, 4 Gill. & J. 332 [23 Am. Dec. 569].

A person appointed guardian of an infant in one state is not, by the common law, entitled to recover from an executor or administrator in another state a legacy or distributive portion left his ward there, without giving security and obtaining letters from the proper tribunal where the legacy or portion is situated: *Morrell v. Dickey*, 1 Johns. Ch. 153; *Andrews v. Herriott*, 4 Cow. 529, note.

In *Kraft v. Wickey*, *supra*, March died in Baltimore, leaving an estate, a wife, and minor children. The surviving mother afterwards removed the minors to Pennsylvania, where a guardian was appointed for some of them, who applied to the orphan's court of Baltimore to revoke the letters of the domestic guardian, which was done, and on appeal to the court of appeals the decree was reversed; the court holding that guardians, like

executors and administrators, could only sue in the courts of the country from which they derived their power; that they have no extraterritorial authority as guardians; that the domestic guardian having the property was bound to pay for the maintenance and education of the ward, and the foreign guardian having the custody of the ward could enforce the fulfillment of this requisition by an application to the proper tribunal; and that in such case the domestic guardian would be regarded as a trustee, etc.

In this state some of the inconveniences arising from these principles of the common law have been remedied by legislation.

Thus, by section 1, chapter 7, Digest, foreign guardians (appointed in any of the states, territories, or districts of the United States) are empowered to sue as such in our courts.

And by the act of the twelfth of January, 1853, entitled "An act to authorize and allow foreign guardians to remove from this state the property of their wards," Pamph. Acts 1852-3, pp. 203, 204, it is provided: "That hereafter it shall be lawful for guardians, appointed in any of the states, territories, or districts of the United States, whose wards may have any property within this state, on bringing evidence of his or her appointment and qualification as such guardian, duly certified and authenticated according to law, to apply to the probate court of the county in which such property may be situate for an order authorizing such guardian to remove said property from this state to the state, territory, or district in which such guardian shall have been appointed and qualified as such; and such probate court, on being satisfied of the authority of such guardian, shall enter up an order authorizing the removal of such property by such guardian."

Had it been shown to the probate court of Union county that the minors in question were legally domiciled in Texas, and a guardian duly appointed for them there, with sufficient bond and security, the court would doubtless have had the power, and it would have been its duty, under the above statute, to order the administrators to pay over to such guardian the portions of their intestate's estate due to his wards. Or if the property had been in the hands of a domestic guardian who was not legally entitled to the custody of the persons of the minors, the court, perhaps, would be authorized, on proper application, to order him to turn over to the guardian of their domicile entitled to such custody and care of their persons any personal effects in the hands of the domestic guardian belong-

ing to them, in order that it might be used by the guardian of their domicile in their maintenance and education.

But in this case we have seen that the father of the minors was domiciled and died in Arkansas; that a guardian was here appointed for his minor children, who by law was entitled to the care and custody of them (there being no proof that their mother survived the father), and that the domicile of their father was, in legal contemplation, the domicile of his minor children.

It does not appear from the record that any proof was made before the probate court that the domicile of the three minors in question had been legally or for any good purpose transferred to Texas, or by what authority or at whose instance they got into Texas.

It is not shown that their mother was living and removed them to Texas, or that their guardian, desiring them to have the care and attention of their sister, the wife of Grimmett, removed them there, or that any relation, by the approbation of their domestic guardian, transferred their domicile.

They being minors, and, it seems, of tender years, could not legally change their domicile so as to divest their domestic guardian of his custody and care of them: Story's *Conf. L.*, 2d ed., sec. 505 a, b, c, and note, p. 17; citing *Potinger v. Wightman*, 3 Meriv. 79, 80.

If minors were permitted to abandon their domestic guardians and go to other states, or if others, without proper authority, were allowed to draw them away and become their guardians, many evil consequences to them and their estates might follow.

It may be regarded as a favorable circumstance to the claims of the foreign guardian in this case that the domestic guardian interposed no objection to the making of the order asked by him of the probate court; yet objection was made by one of the administrators, and no matter by whom the objection was interposed, it was the duty of the court to render the proper decree in the case; and in the absence of any showing in the record that sufficient evidence was introduced to warrant and require the court to make the order sought by Grimmett, the decree must be presumed to have been proper, and the circuit court was not authorized to set it aside.

Such decree, however, would not be a bar to a new application sustained by sufficient evidence. The judgment of the circuit court is affirmed.

AS TO DOMICILE OF CHILD, AND CHANGE THEREOF, see *Hiestand v. Kene*, 46 Am. Dec. 481; *Allen v. Thomason*, 54 Id. 55. Domicile of lunatic: *Clark v. Whitaker*, 46 Id. 337. Domicile of corporation: *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, 53 Id. 742. Distinction between "residence" and "domicile" is pointed out in the extended notes to *Haggart v. Morgan*, 55 Id. 355; *Ringgold v. Barley*, 59 Id. 112, also containing a discussion of many other important questions relating to domicile. See also note to *City of New Albany v. Meekin*, 58 Id. 532.

STATE v. PARNELL.

[16 ARKANSAS, 506.]

INDICTMENT FOR OFFENSE AGAINST PUBLIC MORALS, AND NOT AGAINST INDIVIDUAL, IS SUFFICIENT WHICH CHARGES that the defendant, "on Sunday, the second day of April, A. D. 1854," in the county where the indictment was found, "did sell to divers persons a large quantity of ardent spirits, to wit," etc., without stating the names of the persons to whom the spirits were sold, or that they were sold to some person to the grand jurors unknown.

APPEAL from the circuit court of Scott county. The facts are stated in the opinion.

Jordan, attorney general, for the state.

By Court, ENGLISH, C. J. Parnell was indicted in the circuit court of Scott county, as follows: "The grand jurors, etc., in and for the body of the county of Scott aforesaid, upon their oath, present that Richmond P. Parnell, on Sunday, the second day of April, A. D. 1854, in the county aforesaid, did sell to divers persons a large quantity of ardent spirits, to wit, one quart of whisky, against the peace," etc.

The defendant moved to quash the indictment, on the grounds that it did not allege to whom the spirits were sold, or that they were sold to some person to the grand jurors unknown; and that it was not alleged that the offense was committed in Scott county. The court sustained the motion, and the state appealed. The indictment is for the violation of section 5, article 5, part 8, chapter 51, page 370, Digest, which declares, among other things, that every person who shall on Sunday sell or retail any spirits or wine shall be deemed guilty of a misdemeanor, etc. The venue is well enough alleged. Was it necessary to aver the names of the persons to whom the spirits were sold, or that the names were unknown to the grand jurors?

It is a general rule that in indictments for offenses against the person or property of individuals the name of the party injured must be stated if it is known or can be ascertained, and

if not, it may be alleged that the injury was to a certain person or persons to the jurors unknown, or something equivalent: 1 Ch. Crim. L. 212; *Cameron v. State*, 13 Ark. 712; *Reed v. State*, 16 Id. 499.

In the case at bar the *gravamen* of the charge is a desecration of the sabbath—an offense against public morals, and not against an individual.

If it is necessary to state the name of the person or persons to whom the spirits are sold, it could only be as matter of description. Is it requisite for this purpose?

It was held by this court in a number of cases that in indictments for betting at cards, under the eighth section of the gaming act, Digest, c. 51, part 8, art. 8, sec. 8, it was necessary to set out the names of the persons by whom the game was played as matter of description of the offense, and that the proof must correspond with the allegation: *Barkman v. State*, 18 Ark. 708; *Johnson v. State*, Id. 684; *Jester v. State*, 14 Id. 552; *Drew v. State*, 10 Id. 82; *Parrott v. State*, Id. 574; *Moffatt v. State*, 11 Id. 169; *Stith v. State*, 13 Id. 680.

This rule was found to be so inconvenient in practice that the general assembly, at its recent session, passed an act intending, doubtless, to dispense with the necessity of stating the names of the persons by whom the game is played: Acts 1854-5, p. 270.

A similar question arising now, under a different statute, for the first time, we are not disposed to treat the decisions above referred to as conclusive upon the point; though upon principle, analogous to some extent. The decisions of the courts of our sister states on this subject are conflicting: See Wharton's Crim. L. 713, where they are collected.

In *State v. Munger*, 15 Vt. 290, Bennett, J., said: "The general requisites of an indictment require it to be framed with so much certainty as to identify the offense, that the grand jury may not find a bill for one offense and the prisoner be tried for another; and that he may know what accusation he has to meet, and the jury be able to give a verdict upon it, and the court to see such a definite crime that they may apply the punishment which the law has prescribed, and the prisoner be able to plead his conviction, or acquittal, in bar of a second prosecution for the same offense. It is said that the indictment is bad because it is not averred to whom the liquor was sold, or that the person or persons are unknown. It is of no importance that the indictment should contain such an averment. The of

fense complained of works no injury upon the individual rights of the person to whom the sale was made, and none are supposed to be violated. It has no analogy to an indictment for theft, to which it was likened by the counsel, where the violation of private rights enters into the very essence of the crime. * * * The statute upon which this indictment is founded gives but one penalty for a single violation, and it is immaterial whether the sale is to one or divers individuals."

So in *People v. Adams*, 17 Wend. 477, Nelson, C. J., said: "It is to be remarked that the offense upon the statute consists in the act of selling the spirituous liquors without license; and therefore the designation of the persons to whom sold is in no way material to constitute it. The question is simply one of pleading, whether certainty to a common intent requires the names of the persons to be given to whom the liquor was sold. The precedents appear to be all the other way. Our statutes on this subject appear to correspond substantially with the English acts of parliament, and were undoubtedly taken from them, forbidding the sale of 'distilled spirituous liquors,' or strong water, as will be seen from a collection of them in 2 Burn's Justice, 185, and onward; 4 Wentworth Pl. 504, contains the form of an information upon these statutes, for selling without license, in which the mere act of retailing the liquor without a license is averred; the persons to whom it was sold are not mentioned, or in any way referred to. The same remark is applicable to an information and complaint before justices for selling ale without license: 1 Burn's Justice, 23, 25. There is a precedent in Ch. Crim. L. 434, for selling ale and beer on Sundays, in which the sale is charged as made to divers idle and ill-disposed persons, whose names to the jurors aforesaid are yet unknown. Here, though the persons are mentioned as unknown, yet from the manner in which it is stated it is, I think, to be inferred that the names were not deemed material, as in the precedents where they are so considered it is indicated by the form. In 4 Wentworth Pl. 525, a precedent is given for selling hard soap in a shape different from that required by the statute of 24 Geo. III., c. 48, sec. 14, in which the names of the persons are not mentioned, or in any way referred to. The case is strictly analogous to the one under consideration, so far as respects the question involved. The precedents are clearly with the pleader in this case, and upon a question the decision of which depends so much upon the opinion of the court as to what amounts to certainty to a common intent, these afford, perhaps, as safe a guide as can be found."

In *Commonwealth v. Smith & Burwell*, 1 Gratt. 553, it was held that in an indictment for selling ardent spirits to slaves, without the consent of the master, etc., it was not necessary to state the names of the owners of the slaves to whom the liquor was sold.

So in *Commonwealth v. Dove*, 2 Va. Cas. 26, it was held that in an information for retailing spirituous liquors without a license it was not necessary to name the persons to whom the liquors were sold.

In *Eells v. People*, 4 Scam. 508, Eells was indicted for harboring a certain negro slave owing service to Chancy Durkee, etc., and it was held that it was not necessary to state the name of the slave, as this omission could not in any degree affect the rights of the defendant.

In indictments for misdemeanors, the same technical particularity in the averments is not required as in indictments for the higher grades of crime. If the names of the persons to whom spirits are sold were required to be stated, it would lead to inconvenience in practice rather than tend to promote the ends of justice. It would be often difficult for the grand jury to ascertain them, or the state to prove them as alleged. When a number of persons step into a dram-shop for the purpose of obtaining ardent spirits or wines, a significant nod or tap upon the counter is sufficient to indicate to the keeper their purpose; and in many cases an observer might swear that there was a sale upon the sabbath, but it might be difficult for him to state with requisite certainty the name of the particular individual who made the purchase.

Upon the whole, we think the indictment in this case is substantially good, and ought not to have been quashed.

The judgment is therefore reversed, and the cause remanded for further proceedings.

MOTION TO QUASH INDICTMENT IS ADDRESSED TO SOUND DISCRETION OF COURT: *Commonwealth v. Eastman*, 48 Am. Dec. 596. Indictment must state charge with as much certainty as the circumstances of the case will permit, but nothing more is required: *Commonwealth v. Webster*, 52 Id. 711.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PARSONS v. TUOLUMNE COUNTY WATER CO.

[5 CALIFORNIA, 43.]

EACH BRANCH OF JUDICIAL DEPARTMENT OF CALIFORNIA HAS ITS FUNCTIONS ASSIGNED by the constitution, and is beyond the control of either of the other departments of the government.

TERM "SPECIAL CASES," IN CLAUSE OF CONSTITUTION permitting legislature to confer on county court jurisdiction in "special cases," does not include any class of cases for which the courts of general jurisdiction have always supplied a remedy. The special cases, therefore, must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity.

ACTION TO PREVENT OR ABATE NUISANCE is not a "special case" over which the legislature may give county courts jurisdiction under the California constitution.

ACTION for damages resulting to the plaintiff's land from the overflow of the defendants' canal. The defendants moved to dismiss the cause on the ground that the court had no jurisdiction thereof. This motion was denied, and the defendants assigned error.

Halleck, Peachy, Billings and Park, and Baldwin and Clark, for the appellants.

Wolcott and McNeil, for the respondent.

By Court, HEYDENFELDT, J. The constitution permits the legislature to confer on the county court jurisdiction in "special cases," and it is now necessary to consider what was meant by the term "special cases." If there is no limit to it, then the legislature is unrestrained from giving to that court all the original

powers of the other courts. In *Caulfield v. Hudson*, 3 Cal. 389, and in *Reed's Heirs v. McCormick*, 4 Id. 342, we examined this proposition, and came to the conclusion that each branch of the judicial department had its functions assigned by the constitution, and was beyond the control of either of the other departments of the government, as far as its powers and jurisdiction were concerned.

In consonance with the opinions in those cases, we think that the term "special cases" was not meant to include any class of cases for which the courts of general jurisdiction had always supplied a remedy.

The "special cases," therefore, must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity. The action to prevent or abate nuisances is not one of these, and is amply provided for in the courts of general jurisdiction. In conferring this power upon the county courts, the legislature exceeded its constitutional authority, and the portion of the act which contains it is invalid.

The judgment of the county court is reversed, and the cause dismissed.

MURRAY, C. J., concurred.

SEVERAL DEPARTMENTS OF GOVERNMENT INDEPENDENT: See *Guy v. Herring*, post, p. 85, and note citing prior cases.

JUDICIARY IS SEPARATE AND DISTINCT FROM LEGISLATIVE AND EXECUTIVE DEPARTMENTS OF GOVERNMENT, and each division is itself responsible for its exercise of constitutional powers: *Hawkins v. Governor*, 33 Am. Dec. 346; *Lane v. Dorman*, 36 Id. 543, and citations in note 551; *Dennett, Petitioner*, 54 Id. 602, and citations in note 604; authorities cited in note to *Sharpless v. Mayor of Philadelphia*, 59 Id. 789.

ABATEMENT OR PREVENTION OF NUISANCE, remedy at common law: See *Siles v. Laird*, post, p. 110, and note.

NUISANCE, DEFINITION OF, AT COMMON LAW: See note to *Tanner v. Trustees of Albion*, 40 Am. Dec. 344; *Coker v. Birge*, 54 Id. 347, and citations 351. Any practice deemed injurious to the public may be declared a nuisance by the legislature, and punished as such: *Bepley v. State*, 58 Id. 628. And it is said that the question as to what is a nuisance is a judicial one: See note to *Young v. State Bank*, Id. 632.

COURTS HAVE UNDOUBTED POWER TO DECLARE STATUTES UNCONSTITUTIONAL AND VOID; but it will be exercised with extreme caution, and never, unless the constitutionality of the statute is manifest beyond any serious doubt: See references in note to *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 269; *Baugher v. Nelson*, 52 Id. 694; *Lycoming v. Union*, 53 Id. 575; *Winter v. Jones*, 54 Id. 379; *State v. Field*, 59 Id. 275; *Sharpless v. Mayor of Philadelphia*, Id. 759.

"SPECIAL CASES," IN CONSTITUTIONAL PROVISION ALLOWING LEGISLATURE TO CONFER JURISDICTION on the county courts in special cases, embrace those cases that are the creation of statute, and the proceedings under which are unknown to the general framework of the courts of common law and equity. The principal case is cited to this point in *Brock v. Bruce*, 5 Cal. 280; *People v. Fowler*, 9 Id. 89; *Williams v. Walton*, 25 Id. 146; *Ricks v. Reed*, 19 Id. 574; *McNeil v. Borland*, 23 Id. 147; *Appeal of Houghton*, 42 Id. 62, 68. It is cited in *Brock v. Bruce*, 5 Id. 280, to show that proceedings to enforce a mechanic's lien cannot properly be said to come within the definition of "special cases" given in the main decision; in *People v. Fowler*, 19 Id. 88, where it was said that the county court had no original criminal jurisdiction, and no original jurisdiction in civil suits, except in such "special cases" as the legislature should prescribe, and that these "special cases" could not arise in justices' courts; in *Williams v. Walton*, 9 Id. 146, to the point that the county court had no jurisdiction over an award of arbitrators, set up in defense to an action for work and labor, materials furnished, etc., and could render no judgment; in *Ricks v. Reed*, 19 Id. 574, to show that certain legislative enactments relative to the disposition of town lots in the county of Humboldt, state of California, created a "special case" within the most narrow construction ever given to these words by the supreme court; in *McNeil v. Borland*, 23 Id. 147, sustaining the definition of "special cases" given in the main decision; and in *Appeal of Houghton*, 42 Id. 61, 62, 68, to the same effect.

WILSON v. BERRYMAN.

[5 CALIFORNIA, 44.]

GAMBLING VERDICTS ARE IRREGULAR AND WILL BE SET ASIDE; e. g., when each member, for the purpose of arriving at a verdict, agrees to set down a sum according to his own judgment, divide the aggregate sum by twelve, and return the quotient as the verdict, and does so return such a verdict.

VERDICT OF JURY MAY BE DETERMINED BY AVERAGE, OR OTHER SIMILAR MEANS, provided the jurors agree upon such sum, after it is found, as their verdict; but they must not previously be bound by the contingent result, and must reserve to themselves the right to dissent therefrom.

AFFIDAVITS OF JURORS WILL NOT BE RECEIVED TO IMPEACH THEIR VERDICT, but will be received to substantiate it.

AFFIDAVIT OF JUROR, SWORN TO BE CORRECT BY ANOTHER PARTY, is equivalent to the latter's original affidavit.

TESTIMONY OF SHERIFF IS COMPETENT TO DISCLOSE WHAT TRANSPRIES IN JURY-ROOM.

APPEAL from the tenth judicial district court, Nevada county. Action for damages done to plaintiffs' flume. Verdict for plaintiffs. Defendants moved for a new trial upon the affidavits of the sheriff and one of the jurors, the nature of which will appear from the opinion. Motion overruled, and defendants appealed.

Foote, Aldrich, and Leigh and Stewart, for the appellants.

Churchman and Gardiner, for the respondents.

By Court, MURRAY, C. J. In this case the jury, for the purpose of arriving at a verdict, agreed that each member should set down a sum according to his own judgment, that the aggregate should be divided by twelve, and that the quotient should be returned as the verdict; which was done.

The rule in such cases has been held to be, that if such means is adopted merely to arrive at a proper result for the purpose of determining what the verdict should be, without being bound thereby, and afterwards the jury agree upon such sum as their verdict, that it will be good. But on the other hand, if the jury resort to this or any other similar means of arriving at a verdict, and agree to be bound by the contingent result, without reserving to themselves the right to dissent therefrom, such proceeding will be improper: *Dana v. Tucker*, 4 Johns. 487; *Roberts v. Fadis*, 1 Cow. 238. Such verdicts are regarded in the same light by the courts as gambling verdicts, and will invariably be set aside, just as if the jury had thrown dice, or resorted to any species of gaming, to determine the amount.

It is urged in this case that there was no sufficient affidavit of the fact to warrant the court in setting aside the verdict. It is said that a juror cannot impeach his own verdict, and that the only affidavit is that of a juror, which the under-sheriff swears is true.

Granting this doctrine, which will hardly be disputed at this day, the statement, as drawn up by him, is sworn to as correct by the sheriff, and may properly be treated as his original affidavit.

There is one other question connected with this case, and that is as to the competency of the sheriff to disclose what transpired in the jury-room. It has been suggested that every verdict may be set aside upon the affidavit of a corrupt officer, and that public policy imperatively demands that the secrets of the jury-room should not be revealed.

There are many arguments in favor of this position, and not among the least is that of independence of opinion which would be thus secured. In most of the cases, however, in which this question has occurred, the verdict has been set aside upon the testimony of sheriffs, and no objection seems to have been taken to the competency of such evidence. Although jurors will not be allowed to impeach their own verdict, still they will

be permitted to substantiate it, and this will always be found a sufficient check against collusion or corruption on the part of the officer having them in charge.

We are of opinion that the verdict in this case is void; for these reasons the judgment is reversed, with costs, and a new trial ordered.

HEYDENFELDT, J., concurred.

VERDICT OBTAINED BY RESORT TO UNJUST OR UNREASONABLE MEANS WILL BE SET ASIDE; as where it is found by taking one twelfth of aggregate amount, etc.: *Elledge v. Todd*, 34 Am. Dec. 616; or by resort to chance: *Warner v. Robinson*, 1 Id. 38, and note discussing the question. But if a proposed verdict is found by taking one twelfth of aggregate amount, and this is afterward assented to, the verdict is good: *Bennett v. Baker*, 34 Id. 655.

AFFIDAVITS OF JURORS WILL NOT, AS GENERAL RULE, BE RECEIVED TO IMPEACH THEIR VERDICTS: *Aphorp v. Backus*, 1 Am. Dec. 26; *Cleggage v. Swan*, 5 Id. 400; *Forester v. Guard*, 12 Id. 141; *Bennett v. Baker*, 34 Id. 655; *Nelms v. State*, 53 Id. 94; *Clark v. Carter*, 58 Id. 485; contra: *Elledge v. Todd*, 34 Id. 616, and note 617, comparing conflicting cases. This question is extensively discussed in the notes to *Warner v. Robinson*, 1 Id. 38; *Forester v. Guard*, 12 Id. 142; *Crawford v. State*, 24 Id. 475-479; *Packard v. United States*, 48 Id. 376-379, where authorities pro and con are given.

THE PRINCIPAL CASE WAS CITED in *Donner v. Palmer*, 23 Cal. 48, to show that a verdict molded by chance should be set aside; in *Turner v. Tuolumne County Water Co.*, 25 Id. 400, 402, that a verdict depending upon the contingent result of taking one twelfth of aggregate amount, etc., was vicious and ought to be set aside if the fact were proved by competent testimony, but the court would not admit the affidavits of the jurors for such a purpose; and in *Boyce v. California Stage Co.*, Id. 475, to support the same propositions.

CHIPMAN v. EMERIC.

[5 CALIFORNIA, 49.]

RESTRICTION OF COVENANT AGAINST ASSIGNMENT CONTAINED IN LEASE, when once removed, is forever removed.

RESTRICTION OF COVENANT AGAINST ASSIGNMENT CONTAINED IN LEASE will never be so enforced as to produce a forfeiture. It is a restraint against alienation and against the policy of the law.

LESSER'S COVENANT TO BUILD WHARF, NO PARTICULAR TIME BEING STIPULATED, may be complied with at any period before the expiration of the time, and until then the lessor can have no legitimate cause of complaint.

COVENANT "TO LET LESSOR HAVE WHAT LAND HE AND HIS BROTHERS MIGHT WANT FOR CULTIVATION" is too uncertain to be enforced.

PLEADINGS MUST BE MOST STRONGLY TAKEN AGAINST PLEADER.

APPEAL from the district court of the third judicial district, Alameda county. Action to recover possession of a portion of

a tract of land known and described as the Encinal de San Antonio. The land in dispute was, in February, 1851, leased by Antonio M. Peralta to Payot & Depassier, for the term of six years. The following provisions were in the lease: 1. That the lessees should not assign to any person without obtaining the consent of the lessor; 2. That the lessees were to build a wharf on the land; 3. That the lessor should have what land he wanted for cultivation. After underletting part of the premises to plaintiffs, Payot & Depassier assigned the leasehold to Emeric, the respondent, with Peralta's consent. Afterwards, but prior to this action, Emeric assigned and delivered possession to one Hibberd. Subsequent to Payot & Depassier's assignment, Chipman & Aughinbaugh, the plaintiffs, purchased the land from Peralta, took a deed therefor, and soon afterward demanded certain land of Emeric for agricultural purposes, with which demand Emeric refused to comply. This action was brought before the expiration of the lease, and up to the time of its commencement the wharf had not been erected. Judgment for defendant, and plaintiffs appealed.

A. M. Crane and Charles H. S. Williams. for the appellants.

E. W. F. Sloan, for the respondent.

By Court, HEYDENFELDT, J. The appellants contend that the lease is void, for three reasons: 1. The assignment to Hibberd without appellants' consent; 2. The failure to build a wharf; 3. The refusal to let plaintiffs have the amount of land they demanded.

As to the first point, the court below found as a fact that Peralta, the first grantor, had consented to the assignment of the lease to Emeric. This, if it was even necessary, is sufficient to abrogate the covenant against assignment. It is questionable whether, in any case, such a covenant would be enforced so as to produce a forfeiture. It is in restraint of alienation, and therefore against the policy of the law.

2. The covenant to build a wharf stipulates for no particular time, and as it was to be built exclusively for the benefit of the lessees during the continuance of their term, the lessor, before the expiration of the term, can have no legitimate cause of complaint.

3. The covenant to let the lessor have what land he and his brothers might want for cultivation is a mere personal privilege. It was doubtless made upon some opinion which the lessees formed as to the quantity they might require, and can-

not be construed to extend to any quantity which might be demanded by any successor to the lessor's rights whose means of employing capital and labor in agriculture might be so far beyond those of the original lessor as to take away all the benefits of the lease from the lessees. Indeed, the provision is too indefinite to be enforced in favor of any one.

It is also assigned as error, that the appellants have the right to the land free from the lease, because the latter was not recorded when they took their deed of purchase. Pleadings must be most strongly taken against the pleader. In their declaration they fail to allege a want of notice of the lease. On the contrary, they set it out as if it were fully known to them before their purchase, and as they then go on immediately following and aver a want of notice of the assignment to Emeric, the inference is irresistible that they had notice of the lease. It is equivalent to a direct averment of that fact.

There is no error in the record, and the judgment is affirmed.

MURRAY, C. J., concurred.

Covenants concerning Erections, Improvements, etc.: See *Morse v. Garner*, 47 Am. Dec. 565, and extensive note thereto 576. As to when covenant passes to assignee without separate assignment, see *Trustees of Watertown v. Cowen*, 27 Id. 80.

Pleadings are to be taken most strongly against pleader: *Natchez v. Minor*, 48 Am. Dec. 727; *Dunlap v. Glidden*, 52 Id. 626; *Ex parte Martin*, 58 Id. 321.

CLARKE v. PERRY.

[5 CALIFORNIA, 58.]

PROBATE COURT IS COURT OF SPECIAL AND LIMITED JURISDICTION. Most of general powers of probate court belong peculiarly and originally to court of chancery, which still retains all of its jurisdiction. One not actual party to settlement in probate court may totally disregard such settlement, though it is a final settlement, and file bill in chancery to compel administrator or executor to account.

ACTION by Zeno B. Clarke, sole heir of Charles F. Clarke, an intestate, against George O. Perry, the administrator of the estate, to recover the true value of the property as shown by the profits realized by the defendant. The complaint alleges bad faith in the administration, and that the settlement was fraudulent and made without notice to the plaintiff. The defense relied upon the settlement of the probate court. A copy of the settlement of the administrator with the probate court was in-

roduced by the plaintiff. He then offered to introduce testimony to sustain the allegations of the complaint. This the court refused to admit, on the ground that the allowance and settlement of the estate by the probate court was conclusive against the plaintiff, and that no evidence of its fraudulency or unlawfulness would be admissible. The plaintiff excepted and rested his case; a nonsuit was granted upon the defendant's motion, and the plaintiff appealed.

James H. Hardy, for the appellant.

Robinson and Beatty, for the respondent.

By Court, *HEYDENFELDT*, J. The probate court is a court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains all of its jurisdiction. Where, therefore, a bill is filed in chancery against an administrator to compel him to account, by one who has not been an actual party to a proceeding or settlement in the probate court, he may totally disregard such proceeding or settlement; and although the settlement in the probate court is a final settlement, the complainant, who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the district court, and compel the administrator to a full account. The court below erred in excluding the evidence offered by the complainant to sustain the allegations of his bill, and the judgment is reversed, and the cause remanded.

Murray, C. J.. concurred.

ALL PERSONS INTERESTED IN SUBJECT-MATTER OF SUIT MUST BE MADE PARTIES: *May v. Smith*, 59 Am. Dec. 594, and note 596, containing the collected cases in this series on necessary parties generally.

NATURE OF JURISDICTION OF PROBATE COURTS: *Borden v. State*, 54 Am. Dec. 217; *Tucker v. Harris*, 58 Id. 488, and note 503; *Schultz v. Schultz*, 60 Id. 335.

EQUITY JURISDICTION OVER MATTERS OF PROBATE: *Gaines v. Smiley*, 45 Am. Dec. 295; *Wade v. American Col. Society*, Id. 324; *Slatter v. Glover*, 48 Id. 118; *Powell v. North*, 56 Id. 513, and note 517.

IMPEACHING JUDGMENT OF PROBATE COURTS: *Palmer v. Oakley*, 47 Am. Dec. 41; *Slatter v. Glover*, 48 Id. 118, and citations 119; *Bailey v. Dilworth*, Id. 760; *McDade v. Burch*, 50 Id. 407; *Lynch v. Baxter*, 51 Id. 735; *Cox v. Davis*, 52 Id. 199; *Borden v. State*, 54 Id. 217, and cases cited in notes 243; *Green v. Sargeant*, 56 Id. 88, and notes 93; *Merrill v. Harris*, 57 Id. 359, and notes 384; *Sackett v. Twining*, Id. 599; *Fisk v. Norvel*, 58 Id. 128, and notes 133; *Tucker v. Harris*, Id. 488, and notes 503; *Ralston v. Wood*, Id. 604, and collected cases 609; *Finley v. Carothers*, 60 Id. 179; *Schultz v. Schultz*, Id. 335, and note 353-362.

THE PRINCIPAL CASE IS CITED in *Belloc v. Rogers*, 9 Cal. 129; *Deck v. Gerke*, 12 Id. 436; *Townsend v. Gordon*, 19 Id. 205, to the point that "the probate court is a court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains all its jurisdiction," in *Deck v. Gerke, supra*, to the point that "where a bill is filed in chancery against an administrator, to compel him to account, by one who has not been an actual party to a proceeding or settlement in the probate court, he may totally disregard such proceeding or settlement; and although the settlement in the probate court is a final settlement, the complainant, who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the district court and compel the administrator to a full account;" and in *Griggs v. Clark*, 23 Cal. 429, to show that the jurisdiction vested in the probate court does not divest the district courts of their general jurisdiction as courts of chancery over actions for the settlement of estates. In *Walls v. Walker*, 37 Id. 426, it was cited by counsel, but held by the court to be no authority, to the effect that the result of a former accounting is conclusive against an administrator, and that at a subsequent accounting, by producing the requisite vouchers, he cannot have allowed claims rejected at the former accounting because of the absence of such vouchers.

MCLERAN v. SHARTZER.

[5 CALIFORNIA, 70.]

WHERE OBJECT OF NOTICE OF APPEAL IS ACCOMPLISHED, IT IS IMMATERIAL WHETHER THERE WAS NOTICE OR NOT.

NO NOTICE OF APPEAL IS NECESSARY TO BE SHOWN WHEN BOTH PARTIES APPEAR.

APPEAL FROM THE COUNTY COURT OF SANTA CLARA COUNTY. THE OPINION STATES THE CASE.

Wallace and Ryland, for the appellant.

Moore and Campbell, for the respondent.

By Court, HEYDENFELDT, J. The case was in the county court on appeal. There both parties appeared and argued a motion for continuance, which was granted. At the next term the parties again appear, when the respondent, objecting that the notice of appeal was insufficient, moved to dismiss the appeal, which was done.

It is unnecessary to decide whether the notice of appeal was in conformity with the statute. We have often determined that where the object of notice was accomplished, it is immaterial whether there was notice or not. Where both parties appear, no notice whatever is necessary to be shown.

The judgment is reversed, and the cause remanded.

MURRAY, C. J., concurred.

APPEARANCE AS DISPENSING WITH NOTICE: See *McKinney v. Jones*, 58 Am. Dec. 83, and cases cited in the note thereto. In *Payne v. Davis*, 2 Mont. 384, the principal case is cited to the point that where both parties appear no notice of appeal is necessary to be shown. In *Killip v. Empire Mill Co.*, 2 Nev. 43, the principal case is said to be no authority to the point that a verbal extension of the time for filing a statement is a waiver of notice of appeal.

GUY v. HERMANCE.

[5 CALIFORNIA, 73.]

RIGHT OF STATE TO LAND UNDER WATER, WHERE TIDE EBBs AND FLOWS, is founded upon her sovereign control over the easement or right of navigation.

RIGHT OF STATE IN TIDE-LANDS CEASES WHEN EASEMENT OF NAVIGATION IS DESTROYED, except to prosecute for purpresture and have the easement restored.

LEGISLATURE CANNOT EXERCISE JUDICIAL FUNCTIONS.

PORTION OF STATUTE PRESCRIBING THAT NO INJUNCTION SHALL ISSUE AGAINST COMMISSIONERS appointed by the statute is invalid, being the exercise of a judicial function by the legislature.

ONE HAS RIGHT TO HAVE HIS TITLE TO LAND PROTECTED from a sale that might create a cloud upon it.

APPEAL from an order granting an injunction restraining the defendants from selling certain property in San Francisco. The defendants, in pursuance of the act of May, 1853, entitled "An act to provide for the sale of the interest of the state of California in the property within the water-line front of the city of San Francisco," were duly appointed commissioners to examine into and make sale of such interest. In this capacity they advertised the plaintiffs' property for sale, in order to satisfy whatever interest the state of California might have therein. The case was submitted to a referee to report the facts. He found that formerly the land in question was mostly below high-water mark, but before the admission of California as a state it had been wholly reclaimed, and was now partly covered with buildings, and partly used as public highways. He also found that the plaintiffs' title was derived from grants issued by Francisco Guerrero and F. M. Leavenworth, alcaldes of San Francisco, and that they were in possession of and entitled to the premises. Upon these facts a perpetual injunction was granted.

George C. Bates, for the appellants.

Crockett and Page, for the respondents.

By Court, HEYDENFELDT, J. 1. The right of the state to lands under water where the tide ebbs and flows is founded upon her sovereign control over the easement, or right of navigation. Where, therefore, the easement is destroyed, the right of the state ceases, except to prosecute for purpresture, and have the easement restored.

2. The legislature cannot exercise judicial functions, and therefore cannot except one case or one party from the operation of a general rule of law, either as to right or remedy. That portion, therefore, of the act of May, 1853, entitled "An act to provide for the sale of the interest of the state of California in the property within the water-line," etc., which prescribes that no injunction shall be issued against the commissioners, is invalid.

3. The right of a party to have his title to land protected from a sale which might create a cloud upon it was upheld by this court in the cases of *Smith v. Morse*, 2 Cal. 524; *Shattuck v. Carson*, Id. 588

Judgment affirmed.

MURRAY, C. J., concurred.

LAND BETWEEN HIGH-WATER MARK AND LOW-WATER MARK BELONGS TO SOVEREIGN: *Pike v. Monroe*, 58 Am. Dec. 751; *Mayor etc. of Mobile v. Esalava*; 33 Id. 325. Right of state to lands under water, where tide ebbs and flows: *Susquehanna Canal Co. v. Wright*, 42 Id. 312; *Moor v. Veazie*, 52 Id. 655; *Weston v. Simpson*, 54 Id. 764; *Stuart v. Clark's Lessee*, 58 Id. 49; *Moulton v. Libbey*, 59 Id. 57.

INJUNCTION TO PREVENT CLOUD ON TITLE: See note to *Carlin v. Hudson*, 62 Am. Dec. 524; injunction of tax sale: See *Burnet v. Cincinnati*, 17 Id. 582; see also *Williams v. Cammack*, 61 Id. 508. The principal case is cited and affirmed on this point in *Englund v. Lewis*, 25 Cal. 357; *Bayerque v. Cohen*, McAll. 117; *Tucker v. Kenniston*, 47 N. H. 271. In *Huntington v. C. P. R. R. Co.*, 2 Saw. 514, the principal case is cited to the proposition that "the court will enjoin the casting of a cloud upon a title in cases wherein the cloud itself when cast would be removed."

LEGISLATURE CANNOT EXERCISE JUDICIAL FUNCTIONS: See *Louisville v. Nashville R. R. Co. v. County Court of Davidson*, 62 Am. Dec. 424, and note citing prior cases; *Lane v. Dorman*, 36 Am. Dec. 543, and reference to other cases in this series in notes 551; *Greenough v. Greenough*, 51 Id. 567, and notes 574; *Ervine's Appeal*, 55 Id. 499. The principal case is cited to the point that purely judicial powers cannot be conferred by statute upon supervisors, in *Stone v. Elkins*, 24 Cal. 127.

EFFECT OF PARTIAL OR SPECIAL LAW is discussed in the extended notes to *Pierce v. Kimball*, 23 Am. Dec. 543; *Bank of the State v. Cooper*, 24 Id. 543. The legislature cannot make a law for a particular case, between two contracting parties, contrary to existing law, and order a court to enforce it: *Ervine's Appeal*, 55 Id. 499.

McCLINTOCK v. BRYDEN.

[5 CALIFORNIA, 97.]

POLICY OF BOTH GENERAL AND STATE GOVERNMENTS IS TO RESERVE public lands containing precious metals from settlement for agricultural purposes.

ENTRY FOR PURPOSE OF MINING UPON PUBLIC LANDS ALREADY SETTLED upon for agricultural purposes is not tortious.

SETTLEMENT FOR AGRICULTURAL PURPOSES UPON MINING LANDS OF CALIFORNIA is subject to the rights of miners, who may proceed in good faith to extract any valuable metals found there in the most practicable manner and with the least injury to the occupying claimant.

APPEAL from the district court of the tenth judicial district, Nevada county. The opinion states the case.

Dibble and Thayer, for the appellants.

Conn and Tweed, for the respondent.

By Court, BRYAN, J. This cause comes up upon an appeal from an order granting an injunction, and it will not be necessary to notice many of the points made by counsel in their briefs and arguments upon the hearing of the cause.

McClintock, the plaintiff below, claims that he has settled upon, and now occupies in good faith, a tract of land in the county of Nevada, for grazing and agricultural purposes; that he had made large and valuable improvements upon the same; and that he had quietly and peaceably enjoyed his possession for some years prior to the entry of defendants, in the business of farming and grazing. The defendants below set forth in their answer that the land so claimed by McClintock is mineral land, and that whilst engaged in the business of extracting gold from the earth they advanced their works to the inclosure of McClintock, the plaintiff, and that the earth contained within the inclosure of the plaintiff was valuable for gold-mining purposes.

The record discloses that upon affidavits setting up these facts, amongst others, the county judge of Nevada county dissolved the injunction granted by the district judge, and that the dissolution of the same was followed by a renewed order of injunction from the district judge. It is further shown that the district judge refused to set aside the writ of injunction upon application made to him for that purpose. The appeal having been taken from the order granting the injunction, we deem it only necessary to notice the main issue raised by the bill, answer, and affidavits in the record.

The important question is now presented to us as to what

rights a person may acquire, if any, in the gold-bearing districts of this state, by virtue of his prior possession, by means of inclosures and improvements for farming and grazing purposes. It has been the admitted policy of the different governments of the world for many ages, when those governments have had jurisdiction over soil containing valuable minerals, to reserve those lands for the use of the government, and exclude them as far as possible from any claim of private ownership. Many reasons have been given for this policy, prevailing from the earliest times; one, that the government having alone the right of coinage, it was incident to that right that it should control the metals to be coined; others have thought that the doctrine became general in the days of the feudal ages, when nations were almost constantly in a state of war, and the revenues of kings were much straitened by the frequent and heavy charges of expensive armaments, and that the necessities of revenue and currency excluded the idea that any subject of the crown should, by virtue of his ownership of lands, have it in his power to prevent the extraction from the soil of the wealth so much needed.

But whatever may have been the origin of this doctrine, it is not uncertain that it has been acted upon down to our own times.

The government of this state, being a government of the people, has, as far as its action has been determined, modified this claim to the precious metals; and deriving its revenue from other sources, has, by its uniform policy, permitted its citizens, as well as the citizens and subjects of other states, to use the public lands for the purpose of extracting the most valuable metals from their soil.

The general government has, by acts of congress, reserved from settlement, under her laws regulating the occupation of the public lands, all lands upon which mines may exist.

The government of the United States will issue no patent to a pre-emption claimant upon mineral lands who claims the same for agricultural purposes. The plaintiff below has, then, acquired no right to his settlement from the general government. The state of California, having an undoubted right to pass laws regulating the manner of defending and possessing the public lands within her borders, by virtue of her police powers if she has no higher right, has proceeded to define what lands may be possessed for agricultural purposes, in the act of April 11, 1850, and the act of April 20, 1852 (see

Comp. L. 896); and by the provisions of those laws she expressly excepts from their operation, and refuses to protect, any location upon lands containing any of the precious metals. The act of April 13, 1850, passed "for the better regulation of the mines and the government of foreign miners," seems to give, by necessary implication, whatever right the state might have in the mineral in the soil, and the right to mine, to all native-born or naturalized citizens of the United States who may wish to toil in the gold placers.

The act of 1851, regulating proceedings in civil cases, section 621, defining "that in actions respecting mining claims, proof shall be admitted of the customs, usages, or regulations established or in force at the bar or diggings embracing such claim," would seem to imply a permission, upon the part of the state, to the miner to seek wherever he chose in the gold-bearing districts for the precious metals, and would seem to extend to him whatever right she might have to the mineral when found.

But the inquiry would naturally arise here as to what right the plaintiff can have in maintaining possession of the farm he claims, situate upon mining lands, to the exclusion of the miner, whilst he is in good faith searching for gold. The policy of both the general and state governments has been to reserve these lands from settlement for agricultural purposes. All of the legislation of both governments bearing upon this question denies the claim of the settler for agricultural purposes upon mineral lands; and instead of denying to the miner the privilege of extracting gold wherever found—the one by its tacit permission, and the other by the uniform tendency and implication of its laws—has given him that privilege, and allowed him to define and regulate his location in the mines by the local customs and laws prevailing at the place where he is following his mining vocation.

It has been contended in this cause that the location of the plaintiff for agricultural purposes upon the lands in dispute had taken place prior to any legislation upon the subject of mining lands, and that therefore those laws passed with reference to the business of mining can have no effect in denying his right to his possession, because they would be retroactive in their operation. I cannot perceive the force of this objection. The plaintiff never had, from the time of his location, any right, derived from either government, to the possession of mineral lands inclosed by him, to the exclusion of miners who were in good faith proceeding to extract the gold from the earth.

The plaintiff is in possession without showing a right of property, and relies upon his mere possession, by buildings and inclosures, for his right to recover in this action. A bare prior possession of agricultural lands, which were public lands, has been held sufficient in some of the new states and territories of the Union to sustain ejectment as against a person invading that possession.

The wants and interests of a country have always had their due weight upon courts in applying principles of law which should shape its conditions; and rules must be relaxed, the enforcement of which would be entirely unsuited to the interests of the people they are to govern. In the new agricultural states it was the policy of the government, as well as of the people, that the waste lands should be early settled, cleared, and brought into a state fit for cultivation.

The actual settler upon these lands, over much of the territory of the Union, was allowed the right of pre-emption, and the government recognized in him, by virtue of his settlement, a species of property in the public lands. It was necessary for the encouragement of actual settlers that, without legal title to their property, and without actual inclosures, they should be able to remove any person entering upon lands claimed by them. But how is it with the case before us? The plaintiff settles upon and claims mineral lands for purposes of agriculture, to the exclusion of miners, against the policy of both the general and state governments, without right, and claims protection in his possession merely because he was first upon the ground; that he had fenced in a farm, and was occupied in the business of raising crops.

The maxim of the law, *Qui prior est in tempore, potior est in jure*, cannot be applied in protection of a person who settles upon lands reserved from settlement by the policy of the law, as against one entering for a purpose encouraged wherever minerals may be found.

To sustain the action of ejectment in favor of a party relying upon mere prior possession, the defendant in the action is treated as an intruder and wrong-doer, who invades without right in the premises. The defendants below were in the exercise of a peaceable and lawful calling; and in their search for gold, in the progress of their works, they discovered that the plaintiff had inclosed ground in a mining district, which they believed to be valuable for gold-mining purposes, and upon which they entered for the purpose of carrying on their business of extracting gold.

This was not (in a mining district) the act of intruders or wrong-doers, but the act of persons following a lawful and honorable pursuit, upon ground reserved to such purposes by both the policy and laws of this state.

If the doctrine were otherwise, it is plain to perceive that persons without any right but that of possession could, under the pretense of agriculture, invade the mineral districts of the state, and swallow up the entire mineral wealth by settlements upon one-hundred-and-sixty-acre tracts of land. It would be using the law to a very bad purpose if we should allow a person who has no evidence of title but his improvements, and no right but that of the naked possession he has usurped, to destroy, for his own benefit, the business of a neighborhood, and put as well the government as the mining public at defiance.

I therefore hold that a person who has settled for agricultural purposes upon any of the mining lands of this state has settled upon such lands subject to the rights of miners, who may proceed in good faith to extract any valuable metals there may be found in the lands so occupied by the settler, in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant, according to the express statutes of this state.

The order granting the injunction in the court below is therefore reversed, with costs.

HEYDENFELDT, J., concurred.

RIGHT TO MINE.—Our object in this note will be to give a brief outline of the miner's right to extract the precious metals from the public lands of the United States; and in considering the question, our almost exclusive use of California cases will, it is hoped, meet with approval, when it is remembered that these decisions have been generally followed in the western states and territories. The scope of our subject will also be confined to the Pacific coast. Nearly the entire mining interest of the states and territories of that region have grown up under the protection of the law as administered in California, and to repudiate the principles upon which the courts of that state have acted would be to overturn the foundation upon which the mining rights of that region rest: *Mallett v. Uncle Sam Gold and Silver Mining Co.*, 1 Nev. 203. The decisions of the secretary of the interior and commissioner of the general land-office, under the mining acts, are numerous, but they will not be cited in this note. The practice of the land-office is regulated by them, but they are not of such an authoritative character as to justify the assertion that they are the law, nor are they final upon the various questions of statutory construction. Such is the view taken by the supreme court of the United States: *Lindsey v. Hawes*, 2 Black, 557; *Cunningham v. Ashley*, 14 How. 377; *Barnard's Heirs v. Ashley's Heirs*, 18 Id. 43; *Garland v. Wynn*, 20 Id. 6; *Lytle v. Arkansas*, 22 Id. 193; *Johnson v. Towsley*, 13 Wall. 72.

Law Governing Property in Mines and in Water on Public Mineral Lands Prior to 1866.—The public history relating to the mineral lands of the United States is familiar to one whom the profession love to honor, Mr. Justice Field, and is given by him in this clear and elegant language: "The discovery of gold in California was followed, as is well known, by an immense immigration into the state, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines, distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery followed by appropriation as the foundation of the possessor's title, and development by working as the condition of its retention, and they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the state. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains, and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the state courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts, and sanctioned by the legislation of the state, constituted the law governing prop-

erty in mines and in water on the public mineral lands." *Jennison v. Kirk*, 98 U. S. 453.

Cases Supporting Justice Field's Propositions of Law.—The leading case on the rights of miners in California is that of *Boggs v. Merced Mining Co.*, 14 Cal. 355. It was there held that there was never any license from the government to the miners on the Pacific coast to work the mines. Congress had adopted no specific action on the subject. The supposed license consisted in the forbearance of the government. Any other license was held to rest in mere assertion, and was untrue in fact and unwarranted in law. It was also held that the United States could neither enter upon nor authorize an entry upon private property for the purpose of mining. The United States, like any other proprietor, could only exercise the rights to the minerals in private property in subordination to such rules and regulations as the local sovereign might prescribe: See *Henshaw v. Clark*, Id. 480; *Fremont v. Blower*, 17 Id. 199; *Ah Hee v. Crippen*, 19 Id. 491; *Ah Yew v. Choate*, 24 Id. 562. The leading case on the mining customs of the western states and territories is *Morton v. Solambo Copper Mining Co.*, 26 Id. 527. It was there held that where any local mining custom exists, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten. Legislation could not entirely supplant the force of these customs. They grew up by self-creation, and were not the subjects of invention or provision. They might be superseded, when once observed as obligatory, and the customs of one district sometimes had controlling force in another. They were not the ancient customs of the common law, which, to have force, must be immemorial, merely traditional, and not within living memory: *Smith v. North American Mining Co.*, 1 Nev. 423. But they are the usages which grow out of the regulations by practice, are appurtenant to them, and must be regarded and enforced as an inherent part of them, as explaining, enlarging, and defining them: *Yale on Mining Claims*, 86. The word "customs" is the generic term for laws and regulations: *Morton v. Solambo Copper Mining Co.*, *supra*. For a synopsis of mining regulations, see *Yale on Mining Claims*, 73; *Blanchard & Weeks on Mines*, 116. A custom or usage, however, is void whenever it falls into disuse or is generally disregarded: *Harvey v. Ryan*, 42 Cal. 628. The existence of mining rules and customs is a question of fact, and they must be reasonable: *King v. Edwards*, 1 Mont. 235. For matters relating to proof of customs, see *Coleman v. Clements*, 23 Cal. 245; *Gore v. McBrayer*, 18 Id. 582; *Table Mt. Tunnel Co. v. Stranahan*, 31 Id. 387; *Roach v. Gray*, 16 Id. 383; *Fairbanks v. Woodhouse*, 6 Id. 433; *Pralus v. Pacific G. & S. Mining Co.*, 35 Id. 30; *Attwood v. Fricot*, 17 Id. 37. The leading case on the possession and occupancy of mining ground in the western states and territories is *English v. Johnson*, Id. 107. It is there held that though the regular and usual way of obtaining possession of mining claims be according to the mining regulations of the vicinage, still a prior possession, not so taken, is good, as against one subsequently taking in the same way. For other important matters relating to the possession of mining claims, see *Blanchard & Weeks on Mines*, 183. In controversies between persons on government land, where neither have absolute rights, the presumption of a grant to the first appropriator is simply a rule of convenience, having no place for consideration as against the superior proprietor: *Boggs v. Merced Mining Co.*, 14 Cal. 279. The leading cases on the subject of water rights in the mineral regions are *Irwin v. Phillips*, 5 Id. 140, *post*, p. 113, and *Atchison v. Peterson*, 20 Wall. 507. In the former it was said that the right of miners and ditch-owners in California to divert streams

of water upon the public domain has been recognized by the state legislature, and tacitly assented to by the federal government; and that the privilege of working the mines and the right to divert the streams of water being upon an equal footing, the question as to which has the better right to the water is decided in favor of the one who first appropriated it to his own use. In the latter it was held that the doctrines of the common law on the mineral lands of the public domain in the Pacific states and territories, declaratory of the rights of riparian proprietors respecting the use of running waters, are inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. In this region, prior appropriation gives the better right to running waters to the extent, in quantity and quality, necessary for the uses to which the water is applied. For numerous other questions relative to water rights, see Blanchard & Weeks on Mines, 738. In the work last cited, pp. 122-124, will be found a detailed statement of California legislation concerning the mines.

RIGHTS OF SETTLERS UPON PUBLIC LANDS.—The title to these lands, we have seen, was in the government; and the miners had no title except what arose from possession. It was, however, undoubtedly the policy of California, as shown by the legislation to which we have just adverted, to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner. In evidence of this, acts were passed to protect the possession of agricultural lands acquired by mere occupancy, to protect miners, to provide for the recovery of mining claims, and recognizing canals and ditches which were known to divert the water of streams from their natural channels for mining purposes, and others of similar character. This policy was extended equally to all pursuits without partiality, except in the single case where the rights of the agriculturist were made to yield to those of the miner when gold was discovered in his land. The policy of this exception was obvious. Without it persons without any right but that of possession alone could, under the pretense of agriculture, have invaded the mineral districts of the state, and have absorbed the entire mineral wealth of the country by settlements upon one-hundred-and-sixty-acre tracts of land. It was not only the policy of the state government, but also of the general government, to reserve the mineral lands of the public domain from settlement for agricultural purposes. All of the legislation of both governments bearing upon this question denied the claim of the settler for agricultural purposes upon such lands; and instead of denying to the miner the privilege of extracting gold wherever found, the general government, by its tacit permission, and the state government, by the uniform tendency of its laws, appeared to give him that privilege, and allowed him to define and regulate his location in the mines by the local customs and laws prevailing at the place where he followed his mining vocation. Settlers never had from the time of location any right derived from either government to the possession of mineral lands inclosed by them to the exclusion of miners who were in good faith proceeding to extract gold from the earth. A person, therefore, who settled for agricultural purposes upon any of the mining lands of the state, settled upon such lands subject to the rights of miners who might proceed in good faith to extract any valuable metals found in the lands so occupied by the settler, in the most practicable manner in which they could be extracted, and with the least injury to the occupying claimant, according to the express statutes of the state: See principal case, and *Hicks v. Bell*, 3 Cal. 219; *Stoakes v. Barrett*, 5 Id. 36; *Fitzgerald v. Uriot*, Id. 308; *Tartar v. Spring Creek Co.*, Id. 395; *Burdge v. Underwood*, 6 Id. 45; *Henshaw v.*

Clark, 14 Id. 460; *Fremont v. Flower*, 17 Id. 199; *Martin v. Browner*, 11 Id. 12; *Biddle v. Boggs*, 14 Id. 374-380; *Clark v. Duval*, 15 Id. 85; *Smith v. Doe*, Id. 100; *Levaroni v. Miller*, 34 Id. 231; *Gottschall v. Melsing*, 2 Nev. 185; Stats. of 1852, p. 158.

The exception made in cases where the interests of agriculturists and of miners conflicted was contained in the statutes of 1852, page 158. A right of action was given to any one settled upon the public lands for the purpose of cultivating or grazing against parties interfering with his premises or injuring his lands, where the same was designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent; with a proviso, however, that if the lands contained mines of precious metals, the claim of the occupant should not preclude any persons desiring to do so from working the mines, "as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes." Under this act the supreme court of the state held that miners, for the purpose simply of mining, could enter upon the lands thus occupied, but that the act legalized what would otherwise have been a trespass, and could not be extended by implication to a class of cases not specially provided for. Accordingly, ditches constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated: See *Burdge v. Underwood*, 6 Cal. 45; *Fitzgerald v. Urton*, 5 Id. 308; *Weismer v. Lowery*, 11 Id. 104. There has been some legislation in the state since these decisions permitting water to be conveyed, upon certain conditions, across the lands of others. Such legislation, if limited to merely regulating the terms upon which possessory rights subsequently acquired in the public lands in the state may be enjoyed in the absence of title from the United States, may not be objectionable. The relative rights of miners and occupants of town lots also occupied the attention of the courts. In *Martin v. Browner*, Id. 12, it was held that "a person cannot, under the pretense of a town lot, locate and hold a large tract of mining land in the mineral regions of this state as against persons who enter in good faith for the purpose of digging gold therein. While a person might be entitled to hold a town lot by location or purchase as against miners, such lot must be so holden in good faith and for that purpose; and one cannot, under the mere pretext of a town lot, hold a large portion of land for agricultural purposes as against the claim of the miner. If, under pretense of holding land in exclusive occupancy as a town lot, a party can take up twelve acres of mineral land in the mining district, which, before his appropriation, was used and is mainly valuable for mining purposes, and hold it as owner, he may take up twice or four times that quantity; and the consequence would be that all of the mineral lands in a neighborhood might be appropriated by a few persons, by their making a village or hamlet on or near the land so appropriated. This would be to destroy to a great extent the principle held by this court in *McClintock v. Bryden*, 5 Cal. 97, and *Stokes v. Barrett*, Id. 36, which we have no desire to disturb." This decision, however, was limited as a precedent to the facts of that particular case, as it was considered impossible to prescribe a rule of universal application: See *Gottschall v. Melsing*, 2 Nev. 185. The fact that land was inclosed by the settler, and not taken up in pursuance of the possessory act, was held unimportant: *Clark v. Duval*, 15 Cal. 85. But the doctrine that by mere entry and possession a right could be acquired to the exclusive enjoyment of any given quantity of the public mineral lands of the state was repeatedly condemned as fraught with the most pernicious and

disastrous consequences. And it must not be understood that within the limits of the mines all possessory rights, and all rights of property not founded upon a valid legal title, were held at the mercy and discretion of the miner: *Smith v. Doe*, Id. 105. In this case the court said: "It is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should undoubtedly be protected, as also growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of justice are entitled to the protection of the courts. But in all cases it must be borne in mind that, as a general rule, the public mineral lands of the state are open to the occupancy of every person who in good faith chooses to enter upon them for the purpose of mining, and the examples we have given may serve, in some measure, to indicate the proper modifications of the rule and the restrictions necessary to be placed upon the exercise of this right. It is the duty of the courts to protect private rights of property, but it is no less their duty to secure, as far as possible, the entire freedom of the miners, and to carry out and enforce the obvious policy of the government in this respect." See also *Fremont v. Flower*, 17 Cal. 199; *Ah Hee v. Crippen*, 19 Id. 491; *Ah Yew v. Choate*, 24 Id. 562. As to gardens, see *Gillan v. Hutchinson*, 16 Id. 153; injury to growing crop: *Ripley v. Welch*, 23 Id. 452; homestead improvements established prior to the vesting of the miner's rights: *Levaroni v. Miller*, 34 Id. 231; what is mineral land, and mining on school lands: *Ah Yew v. Choate*, 24 Id. 562; *Doll v. Meador*, 16 Id. 295. Improvements, however, not made in good faith did not assist the settler's possession as against the miner: *Enslinger v. McIntyre*, 23 Id. 593. In *Rogers v. Soggs*, 22 Id. 444, it was said: "Under the laws of this state, any citizen of the United States may enter upon and hold an amount of the public domain, whether within the mineral districts or not, or whether containing mines or not, not exceeding one hundred and sixty acres. He has the right to occupy and improve it, cultivate the soil, plant orchards and vineyards, and apply it to such uses as he may deem most advantageous to himself. But his possession of the land for the common usual purposes of grazing and agriculture is subordinate to the right of the miner, who, when acting in good faith, has the right to enter upon any tract of land held by another merely for agricultural or grazing purposes, and to mine the same, doing no more injury to the premises than may be necessary to enable him to work the mine in the most practicable manner." The miner had the right to locate his mining claim on agricultural land according to the usage and custom of miners; to pass and repass over the land in going to and from his claim; to dig up the soil, sink shafts, run tunnels, and do all other acts necessary to enable him to work his claim effectively, being careful to do no unnecessary injury to the land: Id. But these general rights of the miner were subject to limitations and restrictions, necessary to prevent an interference with rights of property vested in others, and which were entitled to equal protection with his own. Thus, he had no right to use water to work his mine which had been appropriated to other legitimate purposes: *Irwin v. Phillips*, 5 Id. 140; *Tartar v. Spring Valley Water & Mining Co.*, Id. 395; no right to dig a ditch to convey water to his mine over land in the possession of another: *Burdge v. Underwood*, 6 Id. 45; *Weimer v. Lowery*, 11 Id. 104; nor the right to mine land used for a residence and for purposes connected therewith: *Fitzgerald v. Urton*, 5 Id. 308; nor the right to mine land

used for houses, orchards, vineyards, gardens, etc.: *Smith v. Doe*, 15 Id. 101; *Gillan v. Hutchinson*, 16 Id. 153. We have alluded to the general rule that priority of appropriation gave priority of right. This applied in a great variety of cases; and while the rights of the miner were sedulously guarded, the courts would not allow the right of a settler to trees growing upon his land, which he enjoyed in undisturbed possession, to be invaded by the miner. Miners needed wood and timber for sluices, dump-sheds, timbering tunnels, etc., but if they happened to locate where wood was difficult to procure, or where woodlands were held or occupied by others, that was one of the disadvantages of their selection from which the courts would not relieve them. The miner could claim no right to timber under the laws of the United States: *Rogers v. Soggs*, 22 Id. 444. For further cases relative to rights of miner and settler, see *Courchaine v. Bullion Mining Co.*, 4 Nev. 369; *Gibson v. Puchta*, 33 Cal. 310; *Lenz v. Victor*, 17 Id. 271; *Wixon v. Bear River and Auburn W. & M. Co.*, 24 Id. 367.

UNITED STATES MINING ACT OF 1866.—The first act of congress which in express terms granted a mining privilege on public land to any individual, or the public at large, was that of July 25, 1866: 14 Stats. at Large, 242. This is commonly known as the Sutro tunnel act. But this was immediately followed by the act of July 26, 1866: 14 Stats. at Large, 251; see U. S. R. S., secs. 2318-2352, and marginal references. Until this time there had been no legislation looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of congress, to exempt such lands from sale. The passage of the act of 1866, with all its defects, marked a change in the governmental policy, and introduced a new era in the history of mining enterprise. Mr. Justice Field says of it, in *Jennison v. Kirk*, 98 U. S. 458: "In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz-bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government. The senator of Nevada, Hon. William M. Stewart, the author of the act, in advocating its passage in the senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the constitution or laws of the state or of the United States, should govern their determination; and a series of wise judicial decisions has molded these regulations and customs into 'a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes.' The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no

higher law than that enacted by himself, under the implied sanction of a just and generous government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached: *Cong. Globe*, 39th Cong., 1st Sess., part 4, pp. 3225-3228. These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of congress in the passage of the act." Two other important mining acts were subsequently passed: one on July 9, 1870, 16 Stats. at Large, 217; and the other on May 10, 1872, 17 Id. 91. The provisions of these acts will be found in the U. S. R. S., secs. 2318-2352, as shown in the marginal references. For authorities on the subject of vested rights, see *Union Mining Co. v. Ferris*, 2 Saw. 176; *Van Sickie v. Haines*, 7 Nev. 249; *Atchison v. Peterson*, 20 Wall. 507, affirming S. C., 1 Mont. 561; *Basey v. Gallagher*, 20 Wall. 681; S. C., 1 Mont. 457; *Woolmun v. Garringer*, Id. 535; *Barnes v. Sabron*, 10 Nev. 233; *Horbart v. Field*, 6 Id. 77; U. S. R. S., secs. 2318-2352; *Weeks on Mineral Lands*, secs. 196-215.

MINING OPERATIONS REGARDED AS NUISANCES.—The history of mining operations on the Pacific coast bids fair to end in as romantic a manner as it began. The cause of this will be the effect of mining operations, particularly that branch of the business called hydraulic mining. The damage caused by this kind of mining is a matter of public history. Mining by the hydraulic process consists in conveying large quantities of water, by means of ditches, flumes, iron pipes, etc., to the mines, subjecting it to a heavy vertical pressure, and discharging it through "little giants" and "monitors" against the ground to be washed. The effect is remarkable. The gravelly ground melts before this power like snow in the sunshine, and whole mountains are easily washed away. The *detritus* or *débris* from the ground, consisting of boulders, cobbles, gravel-stones, sand, and mud, is washed through the sluices, carried to the canyons and ravines, to the smaller tributaries of larger streams, and is eventually, through the latter, floated and washed to the valleys lying below the mountains in which these operations are carried on. The heavier material moves slowly, and is only carried long distances by means of successive winter floods; but the lighter stuff, known as "tailings" in the mines, and "slickens" in the valleys, is carried by the water, in a state of solution, from the mines to all places reached by the water. Immense operations of this kind are carried on all through the Sierra Nevada mountains lying to the east and north of the great Sacramento valley; and the deposits of "tailings" and "slickens" are claimed by the farmers of this region to be highly injurious to their lands, and to impair the navigability of their rivers. This has been a frequent subject of complaint, and has, of late, been the cause of as much interesting litigation as ever occupied the attention of any judges in any land. In *People v. Gold Run Ditch and Mining Co.*, 4 West Coast Rep. 511, the court said: "The record of the case shows that 'the Gold Run Ditch and Mining Company has been, since August, 1870, a corporation existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors

have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the north fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land, consisting of about twenty millions cubic yards of material, composed mostly of sand, gravel, small stones, cobbles, and bowlders, mixed with small particles of gold, is capable of being washed off into the river. For the purpose of mining this tract of land by the hydraulic process, the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses and will continue to use, under a vertical pressure of several hundred feet, discharging water through "little giants" and "monitors," and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period, has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to wit, of bowlders, cobbles, gravel, and sand, making a yearly discharge of at least six hundred thousand cubic yards; and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land.' Of the material thus discharged into the river, a large portion has been washed from the place of discharge or dump down the river, and 'commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers, and their confluent, but mostly in the American, and upon lands adjacent to both rivers.' The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay, and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from ten to twelve feet, and in some places more, and the bed of the Sacramento to a great extent, below the mouth of the American—from six to twelve feet. In consequence, the beds of the two rivers have shallowed and their channels widened, so that the depths of the rivers have greatly lessened, and their liability to overflow has been materially increased, causing the frequent floods to extend their area, and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining débris. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier débris, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land—probably rendering them within a few years unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And from the same cause, 'the navigation of the Sacramento river has been so greatly impaired that the river, which until the year 1862 was navigated as far as the city of Sacramento without difficulty by steamers of deep draught, to wit, by boats drawing nine or ten feet of water, has been since the year 1862 unnavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds

and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the American, will be so filled and choked up by tailings and other deposits that said rivers will be turned from their channels, cutting new water-ways, injuring or destroying immense tracts of land, and probably will result in greatly impairing the navigability of the Sacramento river?" Upon this state of facts, the court held that such acts of defendant constituted a public nuisance, which might be enjoined in an action in the name of the people of the state, although other mining companies, acting separately and independently of each other, contributed in producing such nuisance; that courts would take judicial notice of the navigability of the Sacramento river; that navigable streams are public highways in which the people of the state have controlling and paramount rights, and all unauthorized intrusions upon the same for purposes unconnected with the rights of navigation or passage are nuisances; that in an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally; that the right of private individuals or corporations to make use of the waters of navigable streams as a place of deposit for their mining débris so as to destroy the navigability of such streams cannot be acquired by prescription; and that the right to continue a public nuisance cannot be acquired by prescription. Against such nuisance, however long continued, the state is bound to protect the people; and for that purpose the attorney general has the power to institute a proceeding in equity in the name of the people to compel the discontinuance of the acts which constitute the nuisance. Upon a counter-appeal in the same case, 4 West Coast Rep. 521, it was held that the court could make no injunction subject to conditions. The plaintiff, upon the facts found, was entitled to a perpetual injunction to compel the discontinuance of the acts complained of; yet it could not be made subject to the condition that "the defendant may at any time, as it may be advised, apply to the court to have the decree and restraining order modified, or vacated, or set aside. And whenever upon such showing it shall appear that efficient means have been provided to impound, detain, and hold back such tailings at any point on said American river above Alder creek, and that such means are sufficient to detain all bowlders, cobble-stones, gravel, and the heavier sand, then said defendant shall be entitled to have said decree vacated and set aside." But the court said that this provision could be of no benefit to defendant; "for if it be possible to permanently impound the débris, etc., which the court perpetually enjoins it from dumping into the American river, the defendant has the right to adopt such means as may be within its power for that purpose; and the right to do so exists independent of the judgment, and may be exercised at all times without reference to it. The perpetual injunction does not restrain the defendant from conducting its business in a lawful manner, and any means adopted to that end are lawful." See *Jones v. Wagner*, 66 Pa. St. 429, a leading case on injuries from mining operations, and the appropriate remedies therefor, and notes to same; *Blanchard & Weeks on Mines*, 616, 655.

RIGHT TO MINE IS PRIMARILY PART OF FREEHOLD, BUT MAY EXIST SEPARATELY.—The owner of the freehold is entitled to all minerals contained upon or beneath the surface of the land, with the exception of royal mines; i. e., mines of silver and gold, which were reserved as the exclusive property of the sovereign: Co. Lit. 46; *Curtis v. Daniel*, 10 East, 273; *Barnes v. Mawson*, 1 Mau. & Sel. 84; *Bainbridge on Mines and Minerals*, 4. *Cuius est solum, ejus est usque ad cælum, usque ad orcum.* Whatever is in a direct line between the surface of any land and the center of the earth belongs to the

owner of the surface: 2 Bla. Com. 18. This ownership is, however, not conclusive; in fact, it is merely a presumption of law which may be overcome by a title distinct from that to the surface: *Riddle v. Brown*, 20 Ala. 412; S. C., 56 Am. Dec. 202. "For the mines may form a distinct possession and different inheritances: *Cullen v. Rich*, Bull. N. P. 102; S. C., 2 Stra. 1142, *nom. Rich v. Johnson*. It is a common occurrence in mining districts for the ownership of the soil to be vested in one person and that of the mines in another:" Bainbridge on Mines and Minerals, 4. See also *Stewart v. Chadwick*, 8 Iowa, 463; *Caldwell v. Copeland*, 37 Pa. St. 427; *Caldwell v. Fulton*, 31 Id. 475; *Arnold v. Stevens*, 24 Pick. 106; S. C., 35 Am. Dec. 305; *Riddle v. Brown*, 20 Ala. 412; S. C., 56 Am. Dec. 202. *Prima facie*, however, the right to mine is a part of and incident to the freehold: *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322. The owner of the fee in streets is the owner of the minerals under them: *Hawenville v. Hawes*, 6 Bush, 232.

Right of Tenant for Life or Years.—A tenant for life or for years may work a mine or quarry that is open at the commencement of his tenancy, for it has become the mere annual profit of the land: *Freer v. Stolenbar*, 36 Barb. 641. He may work open mines to exhaustion, but must pursue the boundaries of the tract: *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344; *Kier v. Peterson*, 41 Id. 361; see also *Wiliard v. Wiliard*, 56 Id. 116; *Neil v. Neil*, 16 Id. 323; *Irwin v. Cosode*, 24 Id. 162; *Lynn's Appeal*, 31 Id. 44; *C. & A. Oil Co. v. U. S. Petroleum Co.*, 57 Id. 83; *Brown v. O'Brien*, 4 Phila. 454. But see *Hollingshead v. Allen*, 17 Pa. St. 275, where it is said that a working of unopened mines by a tenant for life will not work a forfeiture, but he will be liable to account to the tenant in fee; see also *Irwin v. Cosode*, 24 Id. 162; see also Bainbridge on Mines and Minerals, 42-61.

NATURE OF RIGHT TO MINES AND MINERALS, AND OF RIGHT TO MINE IN FREEHOLD OF ANOTHER, AND HOW ACQUIRED.—The right to the mines and minerals contained within the soil is a corporeal hereditament distinct from the surface: 2 Bla. Com. 18; *Caldwell v. Fulton*, 31 Pa. St. 475; *Harlan v. Lehigh Coal Co.*, 35 Id. 287; *Oaldwell v. Copeland*, 37 Id. 427; *Armstrong v. Caldwell*, 53 Id. 284; *Brown v. Corey*, 43 Id. 495; *Pennsylvania Salt Co. v. Neil*, 54 Id. 91; *Kier v. Peterson*, 41 Id. 357 (petroleum); *Stewart v. Chadwick*, 8 Clarke, 463. But a grant of a right to take ore from land, not the exclusive right to the mineral products, is the grant of an incorporeal hereditament: *Gloninger v. Franklin Coal Co.*, 55 Pa. St. 9; *Grove v. Hodges*, Id. 504; *Funk v. Haldeman*, 53 Id. 229; see also *Dark v. Johnston*, 55 Id. 164; *Carnahan v. Brown*, 60 Id. 23; *Rutland Co. v. Ripley*, 10 Wall. 332. The right to dig ore or to mine on another's land, as distinguished from a right in the minerals themselves, that is a right to mine less than the exclusive right in that respect is a mere privilege, constitutes no property in the land itself, is in fact an incorporeal hereditament: *Arnold v. Stevens*, 24 Pick. 106; S. C., 35 Am. Dec. 305; *Riddle v. Brown*, 20 Ala. 412; S. C., 56 Am. Dec. 202; *Desloge v. Pearce*, 38 Mo. 588; *Union Petroleum Co. v. Eliven Petroleum Co.*, 72 Pa. St. 173; *Gillett v. Treganza*, 6 Wm. 343; *Grubb v. Bayard*, 2 Wall. jun. 81. In the last case it is said that this right is indivisible, and the assignee, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil. A fee-simple deed of a lot, with the right to dig coal under an adjoining lot, conveyed an absolute property in the coal and an exclusive right to mine and remove the same: *List v. Cotta*, 4 W. Va. 543. This incorporeal hereditament must be conveyed by deed: *Riddle v. Brown*, 20 Ala. 412; S. C., 56 Am. Dec. 202; *Arnold v. Stevens*, 24 Pick. 106; S. C., 35 Am. Dec. 305; *Desloge v. Pearce*, 38 Mo. 588;

but see *infra* concerning licenses to work mining lands. See *Riddle v. Brown*, 56 Am. Dec. 202; *Bush v. Sullivan*, 54 Id. 506. The right to minerals in the freehold of another may be acquired by adverse possession: *Barnes v. Mason*, 1 Man. & Sel. 77; *Roue v. Grenfell*, Ry. & M. 375, *per* Lord Tenterden; *Desloge v. Pearce*, 38 Mo. 588, 602; *Bainbridge on Mines and Minerals*, 5 et seq. Rights to mine may be acquired by custom or prescription: Id. 11, where are collected and discussed the various rights of prescription and custom existing or which have existed in Great Britain.

MINES OF GOLD AND SILVER—ROYAL MINES.—At common law, mines of gold and silver were, by the prerogative of the sovereign, the property of the crown, though discovered in the land of private owners. They were termed “royal mines,” and belonged to the sovereign wherever they were found. The prerogative is supposed to have originated as a necessary incident of the king’s right of coinage in order to supply him with materials: *Plowd.* 336; 1 Bla. Com. 294; *Bainbridge on Mines and Minerals*, 24. “In most of the royal charters under which this country was settled the grant of the soil expressly includes ‘all mines’ as well as every other thing included or borne in or upon it; reserving as rent only, in the *reddendum*; one-fifth part of all the gold and silver ore to be delivered at the pit’s mouth; *feud of charge*. Such were the charters of Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, and Virginia;” so in New York, New Jersey, and Delaware: *Cruise on Real Property*, 39, note. “Whether the states could demand the fifth or fourth parts reserved as rent, as the assignees of the crown in law, or by virtue of the treaty of peace, and whether the United States may claim the same proportion as the assignees of the states under the constitution, or the whole by their own prerogative on the original grounds above stated, are questions which it is not necessary here to discuss. In *Canatoo’s Case*, 3 Kent’s Com. 378, note, Mr. Justice Clayton said that the right of the state was a right of pre-emption only, and that it was never considered greater by the government of Great Britain. The state of New York at an early period asserted its sovereign right to all mines of gold and silver, giving permission to all discoverers of such mines to work them for twenty-one years only, and no longer without permission of the legislature; and extending the claim to all such mines containing also copper, iron, tin, or lead, where the latter ores do not amount to two thirds of the whole: Stat., Feb. 6, 1789, sess. 12, c. 18. By the revised statutes of 1828, pt. 1, c. 9, tit. 11, the same right is distinctly reasserted and extended to all mines of other metals found in land owned by persons not citizens of any of the United States:” Id. See also note to *Bainbridge on Mines and Minerals*, 1st Am. ed., 37–40.

Public Land in California, Sovereignty respecting.—Mexico succeeded Spain as sovereign and owner of the public lands in California, and the United States, at the close of the Mexican war, succeeded Mexico. The question whether the mines of gold and silver belonged to the owners of the soil, or were incident to the right of sovereignty, became of considerable importance after the cession of this territory to the United States. In *Hicks v. Bell*, 3 Cal. 225, 226, the question was first presented, and it was there said that the United States occupied the position of any private proprietor merely, with the exception of an express exemption from state taxation; and that the mines of gold and silver upon public lands, as well as those in the lands of private citizens, were the property of the state by virtue of her sovereignty. In *Stoakes v. Barrett*, 5 Id. 36, this was accepted as the law, but it was said that to authorize the invasion of private property for the purpose of mining these metals would require specific legislation. But in *Moore v.*

Smaw, 17 Id. 199, *per Field, C. J.*, *Hicks v. Bell, supra*, was overruled, and the right to mines of gold and silver upon public lands held to be in the United States. Upon the cession of California to the United States by Mexico, the United States became the owner of the land in the sense that Blackstone uses it, with all it contains, including all mines and minerals. These, by patent from the United States, pass to the patentee, in the absence of a special reservation. The reasons for holding that "royal mines" are the property of the king do not apply in the United States. "Under the general designation of *jura regalia* are comprehended not only those rights which pertain to the political character and authority of the king, but also those rights which are incidental to his regal dignity, and may be severed at his pleasure from the crown and vested in his subjects. It is only to certain rights of the first class that the states by virtue of their respective sovereignties are entitled. It is to the second class that the right to the mines of gold and silver belongs:" Id. 219.

Therefore, according to this case, the prerogative of royal mines is not a part of the sovereignty, either of the several states or of the United States, but mines of all sorts will belong to the private proprietors of the land; to the several states or to the United States when they are respectively the owners of the soil; to private individuals when they become the owners of the soil. Therefore, when grants from the Mexican government were confirmed by United States patent to the grantees, the latter became the owners *seque ad orcum* of all mines and minerals beneath the surface: *Moore v. Smaw, supra*; *Ah Hee v. Crippen*, 19 Cal. 491; *Boggs v. Merced Mining Co.*, 14 Id. 279; S. C., 3 Wall. 304, *sub nom. Mining Company v. Boggs*; *Henshaw v. Clark*, 14 Cal. 460. Private ownership of the soil includes the ownership of all mines and minerals beneath it: See *United States v. Castillero*, 2 Black, 17; *United States v. Parrott*, 1 McCall, 271; *Fremont v. United States*, 17 How. 542; *Chouteau v. Moloney*, 16 Id. 203; *Lenz v. Victor*, 17 Cal. 271; *Gillan v. Hutchinson*, 16 Id. 153; *Smith v. Doe*, 15 Id. 100. Of course the private proprietor may reserve mines and minerals in granting his land: *Bainbridge on Mines and Minerals*, 33-39; and the policy of the United States statutes has been to prevent large tracts of land containing precious metals from being acquired by the general pre-emption laws: *Tartar v. Spring Creek etc. Co.*, 5 Cal. 398; *Corning Tunnel etc. Co. v. Pell*, 4 Col. 507; U. S. R. S., sec. 2258. The revised statutes provide that mineral lands shall not be sold nor title acquired in them except in the special manner prescribed by statute: U. S. R. S., secs. 2258, 2318, 2319, 2325; see *Weeks on Mineral Lands*, sec. 1, 28. A patent for agricultural lands does not pass title to known deposits of precious metals; and the failure of government surveyors to segregate mineral from agricultural lands cannot operate to defeat the rights of occupant miners: *Gold Hill Quartz Mining Co. v. Ish*, 5 Or. 104; and see *infra*. And in this case it was held that mines of precious metals belong to the eminent domain of the political sovereignty.

CUSTOMS AND RULES OF MINERS NOT CONFLICTING WITH STATUTES GOVERN RIGHT TO MINE.—The early history of gold-mining, in whatever country it may have arisen, is a story of lawlessness and crime. This brilliant metal has been a root of evil even before its removal from its native soil and transplanting into the mechanism of exchange; for its discovery has been made usually in regions unsettled or without a well-established government to regulate conflicting claims and settle, as in civilized and well-governed communities, whatever controversies may arise. The first established rule is, therefore, that of might—those most powerful, as in all primitive communities,

surviving to the rights and privileges desired by all. As, however, the community grows larger, there soon arises a sort of unwritten law regulating conflicting rights and claims, which is enforced by the majority of the members of the mining community. This unwritten law, termed mining customs, rules, or regulations, has been universally recognized in the courts as binding upon the parties whenever a case involving it has come before them for decision. In *Irwin v. Phillips*, post, p. 113, it is stated in general terms that courts are bound to take notice of the political and social conditions of the country which they judicially rule.

So with respect to local mining customs, rules, and regulations, they are binding and decisive upon the rights of parties if they are not in conflict with some statutory provision: *Jones v. Jackson*, 9 Cal. 237; *McGarrity v. Byington*, 12 Id. 426; *Roach v. Gray*, 16 Id. 383; *English v. Johnson*, 17 Id. 107; *Prosser v. Parks*, 18 Id. 47; *Table Mountain etc. Co. v. Stranahan*, 20 Id. 198; *Morton v. Solambo etc. Co.*, 28 Id. 527; *Table Mountain etc. Co. v. Stranahan*, 31 Id. 387; *Pralus v. Jefferson etc. Mining Co.*, 34 Id. 558; *Wolsey v. Lebanon Mining Co.*, 4 Col. 112; *Johnson v. Buell*, Id. 557; *Flaherty v. Givins*, 1 Dakota, 509; *Beatty v. Gregory*, 17 Iowa, 109; *Smith v. North American etc. Co.*, 1 Nev. 423; *Mallett v. Uncle Sam etc. Co.*, Id. 188; *Oreamuno v. Uncle Sam etc. Co.*, Id. 215; *Golden Fleece etc. Co. v. Cable etc. Co.*, 12 Id. 312; *McCormick v. Varnes*, 2 Utah, 355; *North Noonday Mining Co. v. Orient Mining Co.*, 6 Saw. 299; *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 7 Id. 96; *Jennison v. Kirk*, 98 U. S. 453. See also the remarks of Mr. Senator Stewart of Nevada, made in the United States senate in June, 1865, and reported in 3 Wall. 777. See also note by the American editor of Bainbridge on Mines and Minerals, 1 Am. ed., 25 et seq. To be binding, these customs must not conflict with the laws of the state or of the United States: *Golden Fleece etc. Co. v. Cable Co.*, 12 Nev. 312; *McCormick v. Varnes*, 2 Utah, 355; *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 7 Saw. 96. When in violation of such laws, they will be invalid: *Wolsey v. Lebanon Mining Co.*, 4 Col. 112; *Johnson v. Buell*, Id. 557; and the statute will prevail: *Original Co. v. Winthrop Mining Co.*, 60 Cal. 631. And as a matter of fact, many rights and duties of miners formerly regulated only by these mining customs are now subject to statutory provisions, as, for example, the location of claims.

Furthermore, in order that miners' rules may be of any validity, they must not only be established or enacted, but must be enforced at the time and place of the location. They are void when they fall into disuse or are generally disregarded: *North Noonday Mining Co. v. Orient Mining Co.*, 6 Saw. 299. Still, it is presumed that they continue in force until the contrary is shown: *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 7 Id. 96. Local customs may prevail concerning the manner of locating and holding claims: *Mallett v. Uncle Sam etc. Co.*, 1 Nev. 188. Mining rules may limit quantity of ground to be claimed: *Table Mountain etc. Co. v. Stranahan*, 20 Cal. 198; *Prosser v. Parks*, 18 Id. 47; but not the number of claims one may acquire by purchase. But a local custom adopted after the location of a claim cannot limit the extent of a claim previously located: *Table Mountain etc. Co. v. Stranahan*, 31 Id. 387. If no local custom prevails, a general custom may be shown: Id. To enable party to maintain right to mining claim, he must substantially comply with mining rules and customs: *Oreamuno v. Uncle Sam etc. Co.*, 1 Nev. 215; *Mallett v. Uncle Sam etc. Co.*, Id. 188. The right to a mining claim vests by taking in accordance with the local rules: *McGarrity v. Byington*, 12 Cal. 426. General customs of miners enter into a mining lease: *Beatty v. Gregory*, 17 Iowa, 109. Failure to comply with the local regulations of a mining district will not work a

forfeiture of a prior location, unless such regulation prescribes a forfeiture as a penalty for its own observance: *Johnson v. McLaughlin*, 3 West Coast Rep. 178; *Bell v. Bed Rock etc. Co.*, 36 Cal. 214; *McGarrity v. Byington*, 12 Id. 426.

Possessory Rights of Miner.—Actual possession of a portion of a mining claim by custom may be constructive possession of the whole claim held in accordance with such customs: *Hicks v. Bell*, 3 Cal. 219; *Pratus v. Jefferson etc. Mining Co.*, 34 Id. 558. The possession necessary to hold mining claims being defined by mining customs, *possessio pedis* may not be necessary: *Attwood v. Fricot*, 17 Id. 37; *English v. Johnson*, Id. 107; *Table Mountain etc. Co. v. Stranahan*, 20 Id. 198. But the claim must be in some way defined as to limits before possession of a part gives a right to any more than the part actually possessed or worked: *Attwood v. Fricot*, 17 Id. 37; see *Table Mountain etc. Co. v. Stranahan*, 20 Id. 198. Still, mere prior possession, though not in accordance with local mining rules, is better than a subsequent possession in the same way: *English v. Johnson*, 17 Id. 107; *Table Mountain etc. Co. v. Stranahan*, 20 Id. 198. And actual possession makes out a *prima facie* case for the mining claimant: *Golden Fleeces etc. Co. v. Cable etc. Co.*, 12 Nev. 812.

A claim under a deed or color of title is equivalent to a constructive possession of the whole claim, and under such color of title a plaintiff may recover in ejectment the entire claim, and not merely the area actually occupied: *Harris v. Equator etc. Co.*, 3 McCrary, 14; *Attwood v. Fricot*, 17 Cal. 37. Mere prior occupancy is sufficient in ejectment: *Richardson v. McNulty*, 24 Id. 339. Actual or constructive possession is necessary to maintain action to quiet title: *Pratus v. Jefferson etc. Mining Co.*, 34 Id. 558. In general, a miner appropriating land for mining purposes has the right to the exclusive possession of the claim: *Gottschall v. Melzing*, 2 Nev. 186; and he may prevent another party from erecting any superstructure or digging a ditch thereon; and evidence that a portion of the claim is not valuable for mining purposes is not admissible to prove that the owner of the claim has no right to hold such portion: *Correa v. Fretas*, 42 Cal. 339. Even under the United States statutes, U. S. R. S., sec. 2320, providing that a location cannot be made until the discovery of mineral in place, the actual possession of a mining claimant is protected. A party entering upon actual possession is a trespasser: *North Noonday Mining Co. v. Orient Mining Co.*, 6 Saw. 503. Such possession is *prima facie* evidence of title, and an entry without right or color of right upon such possession is unlawful, though the parties entering may believe the location of the claim to be void: *Phenix Mill and Mining Co. v. Lawrence*, 55 Cal. 143. A miner in actual possession of the surface of mineral lands, and seeking the vein or lode therein, may maintain his possession (*possessio pedis*) against all persons having no better right to the premises, and may maintain ejectment against them if ousted: *Field v. Gray*, 14 Rep. 44 (Arizona); *Croesman v. Pendery*, 2 McCrary, 139; see *Funk v. Sterrett*, 59 Cal. 613. As between two locator's, and as affecting their rights merely, one cannot locate a mining claim on ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied: *Eilers v. Boazman*, 1 West Coast Rep. 632; see *Belt v. Meagher*, 3 Mont. 65. Nor can an entry be made upon the actual possession of another for the purpose of laying a foundation for a pre-emption claim: *Du Prat v. James*, 3 West Coast Rep. 651. A location may be valid up to, but cannot be extended over, a senior discovery in the actual possession of another: *Faxon v. Barnard*, 2 McCrary, 44.

One in actual possession, having uncovered the lode, though not having filed upon the claim as required by law, cannot be ousted by a subsequent discoverer as to the ground actually held. And the burden is upon the plaintiff to show that a defendant who had formerly been in possession was not still in possession at the time of his own location: *Faxon v. Barnard*, 2 McCrary, 44. See also *Eilers v. Boatman*, 1 West Coast Rep. 632; *Funk v. Sterrett*, 59 Cal. 613. The miner's actual possession will be protected against all others having no better right; but when he asserts title to a full claim, he must prove a lode extending throughout the claim: *Zollars etc. M. Co. v. Evans*, 2 McCrary, 39; and a general compliance with the mining statute, as by distinctly marking out his claim: *Funk v. Sterrett*, 59 Cal. 613. A notice of discovery and claim, defective in failing to specify the extent of the amount claimed, will nevertheless protect the place where it stands; but as against others locating in the vicinity, it will protect only the ground necessary for sinking a shaft: *Erhardt v. Boaro*, 3 McCrary, 19.

Under the mining laws of the United States as they now exist, the locator of a mining claim becomes the assignee [licensee?] of the United States, and so long as the law remains in force, and he complies with the conditions imposed by it, his right to the possession of his claim, and to appropriate to his own use the mineral deposits therein, is full and complete, and he need not take any steps to purchase the land or obtain a patent for it: *Chapman v. Toy Long*, 4 Saw. 28. The right acquired by a locator of mineral ground on the public domain acting in accordance with the provisions of law, local laws, rules, and regulations, is a legal and exclusive right of possession; and so long as this right is kept alive by representation, no one else has the right to enter upon and relocate the same: *Belk v. Meagher*, 3 Mont. 65. One who goes upon ground taken up by another for mining purposes during the temporary absence of the first locator, and excludes him therefrom, and thereby prevents him from completing his title, shall not be permitted to allege any defect in that title: *Erhardt v. Boaro*, 3 McCrary, 19.

RIGHT TO SURFACE GROUND NECESSARY FOR MINING PURPOSES.—On the ground of custom, it has been held in California that a miner may appropriate ground necessary for the deposit of his tailings: *Jones v. Jackson*, 9 Cal. 237. In Nevada, a statute has been held constitutional which allows the condemnation of land necessary for mining purposes. The lands sought to be condemned were the most eligible and convenient for the erection of expensive machinery and sinking a shaft, and no other lands could have been selected, except at great expense, and at places inaccessible to a railroad or to wagon roads, without which the business of the mining company could not be successfully conducted. It was held that a necessity existed for the condemnation of the land in controversy: *Overman Silver Mining Co. v. Corcoran*, 15 Nev. 147. Where a reservation of minerals with the right of mining them has been made in a deed of the surface, ejectment will not lie for those parts of the land necessarily occupied by shafts or other mining excavations or erections for mining purposes: *Ericson v. Land and Iron Co.*, 16 Rep. 336 (Mich.).

WAIVER AND ESTOPPEL RESPECTING RIGHT TO MINE BY PERMITTING IMPROVEMENTS BY ANOTHER, ETC.—*Estoppel in pais* applies to mining ground, as to other real estate claimed under a similar kind of title; and by remaining silent while another enters upon the land and makes improvements, the original claimant waives his right to the possession of the claim: *Kelly v. Taylor*, 23 Cal. 11, 15; *Real Del Monte Mining Co. v. Pond etc. Mining Co.*, Id. 82. This will occur, however, only when the owner has knowledge of

the fact that improvements are being made: *McGarry v. Byington*, 12 Id. 426. So under the United States statute requiring the discovery of mineral in place to constitute a valid location, the prospector upon the public domain may hold to the extent of his claim in actual possession prior to the discovery of mineral in place; but if he stand by and permit another to sink a shaft within his boundaries, and the latter first discovers mineral, his will be the better claim: *Crossman v. Pendery*, 2 McCrary, 139. So a failure by a first locator to object when a subsequent locator applies for a patent will constitute a waiver: *Eureka Case*, 4 Saw. 302.

CONVEYANCE OF MINING CLAIM.—On the ground that the right to a mining claim on public lands rests upon possession only, it was held in California that a sale by parol by one in possession, accompanied by a transfer of possession, transferred the title: *Gatwood v. McLaughlin*, 23 Cal. 178; *Antoine Co. v. Ridge Co.*, Id. 219; *Patterson v. Keystone etc. Co.*, Id. 575; *Table Mountain etc. Co. v. Stranahan*, 20 Id. 198; see, however, *Clark v. McElroy*, 11 Id. 154. By force of a mining custom, a mining claim was validly transferred in Utah by delivery of possession: *Blodgett v. Polosi et al. Mining Co.*, 34 Id. 227. But since the passage of the California statute of 1860, amended in 1863, title to mining claims can be passed in that state only by instruments in writing: *Patterson v. Keystone Mining Co.*, 30 Id. 360; *Goller v. Fett*, Id. 481; *Felger v. Coward*, 35 Id. 650; *King v. Randlett*, 33 Id. 318. A gold mine is real estate under the California civil code, section 1091, and an interest therein, other than an estate at will, or for a term not exceeding one year, can be transferred only by an instrument in writing: *Melton v. Lambard*, 51 Id. 258. In *Harris v. Equator etc. Co.*, 3 McCrary, 14, it is said that as to conveyance and descent, the rules of real property apply to mining claims. The right to mine on private land, being an incorporeal hereditament, lies in grant, and can be conveyed only by deed: *Riddle v. Brown*, 20 Ala. 412; S. C., 56 Am. Dec. 202; *Arnold v. Stevens*, 24 Pick. 106; S. C., 35 Am. Dec. 305; *Desloge v. Pearce*, 28 Mo. 588; *McBee v. Loftis*, 1 Stroh. Eq. 90; and see "Nature of Right to Mines," *supra*.

ALIENS HAVE NO RIGHT TO MINE ON PUBLIC LANDS. In California, an early statute prohibited foreigners from taking gold out of the mines of that state without first obtaining a license. But it was held under the statute that the fact that the persons in possession of a gold mine were aliens without a license afforded no apology for trespassers. The state alone could enforce the law, the manner of doing so being provided in the statute: *Mitchell v. Hagoood*, 6 Cal. 148. The United States statute of 1866 opened the public mineral lands to citizens of the United States and those "who have declared their intention to become such." The statute of 1872 also contained this restriction as to aliens. See U. S. R. S., sec. 2319. Therefore, it is held that only United States citizens, or those having declared their intention to become such, can make a valid location: *North Noonday Mining Co. v. Orient Mining Co.*, 6 Saw. 299; *Golden Fleece etc. Co. v. Cable etc. Co.*, 12 Nev. 312. But a joint location by a citizen and an alien is good if it is not greater than what may be located by one citizen: *North Noonday Mining Co. v. Orient Mining Co.*, 6 Saw. 299. A conveyance by an alien to a citizen would be good: *Id.* A corporation, under the laws of California, is a citizen: *Id.* Upon declaring his intention to become a citizen, an alien may have the advantage of work previously done, and of a record previously made by him in locating a mining claim on public mineral lands: *Crasus etc. Co. v. Colorado etc. Co.*, 19 Fed. Rep. 78; S. C., 1 West Coast Rep. 451. The complaint in an action to determine the right of possession to a mining claim should allege that the plaint-

iffs are citizens of the United States, or have declared their intention to become such: See *Doon v. Tesh*, 5 Id. 596. An injunction will be granted to restrain the working of a placer gold mine located by complainants while in the possession of aliens: *Chapman v. Toy Long*, 4 Saw. 28.

RIGHT TO MINE UNDER UNITED STATES STATUTES.—After making a valid location of a mineral lode or ledge, and complying with the local and national mining laws, the locator obtains a vested right to such property, of which he cannot be divested: *Blake v. Butte Silver Mining Co.*, 2 Utah, 54. "Mining claim" is the name given to that portion of the public mineral land which the miner takes up and holds in accordance with mining laws, local and statutory, for mining purposes, and the term includes the vein specifically located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines: *Mount Diablo etc. Co. v. Callison*, 5 Saw. 439. Before the act of congress of 1872, each locator was entitled to but one vein, but after this act took effect, he became entitled to all veins having the top or apex within the surface lines of his location: *Blake v. Butte etc. Co.*, 2 Utah, 54; *Mount Diablo etc. Co. v. Callison*, 5 Saw. 439; *Jupiter Mining Co. v. Bodie etc. Mining Co.*, 7 Id. 96; see U. S. R. S., sec. 2322.

MINING CLAIMS UNDER UNITED STATES STATUTES—DEFINITIONS OF "VEIN OR LODE" AND "APEX."—A vein or lode is a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, or many feet thick, or irregular in thickness; and it may be rich or poor at the point of discovery, provided it contains any of the metals named in the statute: *North Noonday Mining Co. v. Orient Mining Co.*, 6 Saw. 299. A vein or lode may be defined as a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain: *Iron Silver Mining Co. v. Cheeseman*, 2 McCrary, 191; *Stevens v. Williams*, 1 Id. 480. The statute contemplates such lode and veins as are so called by miners: *Harrington v. Chambers*, 1 West Coast Rep. 63. In *Eureka Case*, 4 Saw. 302, it was said that the terms "vein" and "lode," as used by miners and in the mining acts of congress, are applicable to any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock. But in *Mount Diablo etc. Co. v. Callison*, 5 Id. 439, it was said that while metalliferous rock in place, not in a fissure, may be found under such conditions within clearly defined boundaries as to require recognition as a vein or lode, as in the *Eureka Case*, 4 Saw. 302, a broad metalliferous zone having within its limits true fissure veins plainly bounded cannot be regarded as a single vein or lode, although such zone may itself have boundaries which may be traced. "Vein," "lode," and "ledge," the words used in the statute to designate mineral deposit in rock, are nearly synonymous in meaning: *Iron Silver Mining Co. v. Cheeseman*, 2 McCrary, 191. The existence of such a lode is fact for jury: Id. The top or apex is the end or edge or terminal point of the lode nearest the surface of the earth, without regard to the depth from the surface at which it may be found: *Iron Mine v. Loella Mine*, Id. 121. But if a vein at its highest point turns over and pursues its course downwards, then such point is merely a swell in the mineral matter, and not a true apex: *Stevens v. Williams*, 1 Id. 480.

RIGHT TO FOLLOW VEIN ON ITS DIP INTO LAND OF ANOTHER.—Under these statutes, it is held that the locator may follow a vein or lode having its apex within his surface lines to an indefinite depth on its dip, although in its downward trend it is carried beyond the side lines of the location into the adjoining land of another: *McCormick v. Varnes*, 2 Utah, 255; *Blake v. Butte etc.*

Ta., Id. 54; *Wolfley v. Lebanon Mining Co.*, 4 Col. 112; *Johnson v. Buell*, Id. 557; *Stevens v. Williams*, 1 McCrary, 480; *Iron Mine v. Loella Mine*, 2 Id. 121; *Van Zandt v. Argentine Mining Co.*, Id. 159; *Eureka Case*, 4 Saw. 303, 324; *Flagstaff Mining Co. v. Tarbet*, 98 U. S. 463. And he may follow the vein beyond such side lines at any point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he may follow the same in its departure from the perpendicular, in any degree, until it reaches the horizontal: *Stevens v. Williams*, 1 McCrary, 480. But in its onward course or strike the vein cannot be followed beyond the boundaries of the location: *Wolfley v. Lebanon Mining Co.*, 4 Col. 112; *Johnson v. Buell*, Id. 557; *McCormick v. Varnes*, 2 Utah, 355; *Eureka Case*, 4 Saw. 303, 324; see U. S. R. S., sec. 2322.

The right of following the vein on its dip is based upon the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface. The end lines bound the vein, and beyond these lines, extended perpendicularly downward, the locator cannot follow the vein on its dip or in any way: *Flagstaff Mining Co. v. Tarbet*, 98 U. S. 463; *McCormick v. Varnes*, 2 Utah, 355; *Wolfley v. Lebanon Mining Co.*, 4 Col. 112; *Johnson v. Buell*, Id. 557; see *Eureka Case*, 4 Saw. 303, 324. Where no "end lines" are established as provided by statute, the location may be valid for all that can be found within surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist: *Elgin Mining and Smelting Co. v. Iron Silver Mining Co.*, 14 Fed. Rep. 377. A division line fixed by agreement between two locators extends perpendicularly downwards: *Eureka Case*, 4 Saw. 303, 325, 326; *Richmond Mining Co. v. Eureka Mining Co.*, 103 U. S. 839.

LOCATIONS CROSSWISE OF LODE.—No location which will entitle the locator to go beyond his lines can be made on the middle part of a lode, or otherwise than at the top or apex. If the lode is continuous from side to side of the claim, that is, if coming in at one side it passes unbroken to the other, the locator cannot follow it beyond his surface lines: *Iron Mine v. Loella Mine*, 2 McCrary, 121. A location laid crosswise of a lode or vein, instead of following its course, will secure only so much of the vein as it actually crosses at the surface, and its side lines will become its end lines, for the purpose of defining the rights of owners: *Flagstaff Mining Co. v. Tarbet*, 98 U. S. 463.

PRIOR LOCATION ON DIP, ERROR OF.—Ordinarily, the owner of a mining claim in which is found the top or apex of a lode may follow the vein within or without his side lines on its dip to any depth, yet if the same vein has been previously discovered and located on the dip, such discovery will prevail against a junior discovery, though located on the apex of the vein: *Van Zandt v. Argentine Mining Co.*, 2 McCrary, 159; see *Iron Mine v. Loella Mine*, Id. 121.

SUBTERRANEous WORK UPON DIP OF LODE BY WRONG-DOERS.—The location of a vein or lode made upon the surface where the vein or lode finds its apex will not be defeated by the secret underground workings and possession of parties having no possession of or right to the surface embracing it. The possession of a vein recognized by the mining laws, and to which protection is given, is a possession by one who holds the surface where the vein makes its apex: *Eilers v. Boatman*, 1 West Coast Rep. 632. Therefore, a locator working subterraneously into the dip of the vein belonging to another is a trespasser, and liable to action for taking ore: *Flagstaff Mining Co. v. Tarbet*, 98 U. S. 463.

SUBTERRANEous LOCATION.—The effect of section 2 of the act of congress of May 10, 1872, is to give a party running a tunnel for any purpose, whether for prospecting or development, the right to preempt and locate any and all lodes not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface: *Corning Tunnel etc. Co. v. Pell*, 4 Col. 507.

Ore "in Place" to Constitute Valid Location.—A vein or lode must be "in place" where the location is made: U. S. R. S., sec. 2320. If the ore body is continuous, to the extent that it may maintain that character, it is in place, whether deposited in that form or moved to its position bodily with its inclosing walls. Whether the vein is thick or thin is not material, so it is continuous. But if the territory is so broken up, jumbled, and mixed, the several parts together, that there is nothing continuous, there is no lode in place: *Iron Silver Mining Co. v. Cheeseman*, 2 McCrary, 191; see *Van Zandt v. Argentine Mining Co.*, Id. 159.

In general, no valid location of a mining claim can be made until a vein or deposit of gold, silver, or metalliferous ore or rock in place has been discovered: *Overman etc. Co. v. Corcoran*, 15 Nev. 147; *Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 7 Saw. 96. No rights are acquired by a location before discovery of a vein or lode within the limits of the claim located: *North Noonday Mining Co. v. Orient Mining Co.*, 6 Id. 299. Still, although the discovery of a lode is made after the location, this will be sufficient against all who have not theretofore acquired an interest in the lode, the discovery relating back to the time of the location: *Zollars etc. Mining Co. v. Evans*, 2 McCrary, 39; *Jupiter Mining Co. v. Bodie etc. Mining Co.*, 7 Saw. 96; but see *Van Zandt v. Argentine Mining Co.*, 2 McCrary, 159. The locator need not be the first discoverer, but it must be known and claimed by him: *Jupiter Mining Co. v. Bodie etc. Mining Co.*, 7 Saw. 96. See "Possessory Rights," *supra*.

THE PRINCIPAL CASE IS CITED in *Rupley v. Welch*, 23 Cal. 456; *Burdge v. Underwood*, 6 Id. 46, upon the right of a miner, for the purpose of mining, to enter upon public lands held purely for agricultural and grazing purposes. In *Martin v. Browner*, 11 Id. 14, it is cited upon the right of a miner to enter upon mineral land previously appropriated as a town lot. In *Fitzgerald v. Urton*, 5 Id. 310, it is held that persons settled in good faith upon lots in mining towns, and carrying on business, should be reasonably protected, and miners will not be allowed to disturb their possession, citing and distinguishing the principal case as being a case where the mineral lands were held for agricultural purposes. The statute of 1850 seems to give the state's right in minerals in the soil and the right to mine to all native-born or naturalized citizens of the United States: *Merced Mining Co. v. Fremont*, 7 Id. 324.

STILES v. LAIRD.

[5 CALIFORNIA, 120.]

STATUTE DEFINING WHAT ARE NUISANCES, AND PRESCRIBING REMEDY BY ACTION, does not take away any common-law remedy in the abatement of nuisances that the statute does not embrace.

NUISANCE, WHETHER PUBLIC OR PRIVATE, MAY BE ABATED at common law by the party aggrieved, if done without breach of the peace.

MINERS WHO ARE FIRST IN APPROPRIATION OF RUNNING WATER for mining uses may abate a nuisance caused by a dam subsequently erected below their claims by removing the dam in a peaceable manner.

APPEAL from the district court of the tenth judicial district, Nevada county. The opinion states the case.

Alexander Anderson and J. W. G. Smith, for the appellants.

Buckner and Hill, for the respondent.

By Court, BRYAN, J. This cause comes up upon the following state of facts: The respondent purchased from miners upon Lawson's ravine, in the county of Nevada, certain mining claims situated upon the ravine which had been held and worked for several years. A large surplus of water from the debouching of foreign ditches passed through the ravine, which was used by the miners upon the ravine in the washing of the gold-bearing earth, and the removal of tailings from their claims. Subsequently to the location of mining claims upon the ravine, a portion of the plaintiffs below erected a dam for the purpose of turning the water into a mill-race, and conducting the water to a mill occupied by them. The respondent and others mining upon the ravine complained of the erection and retention of the dam as injurious to the free use of their mining property above the dam by flooding their ground with water, and preventing an outlet to the tailings from their claims. Notice was given, as appears by the evidence sent up, to the plaintiffs below to remove or open their dam on account of the injury it was working to those above.

The plaintiffs below not removing their dam, respondent Laird with others proceeded, as they attempted to establish by proof, in a peaceable manner, to remove the dam themselves and abate the same as a nuisance.

This action was brought against them for damages in the court below upon the account of the removal above alluded to, and the jury found a general verdict for the defendants. The plaintiffs appeal, and assign as error the charge of the court to the jury and errors of law occurring at the trial.

Appellants' counsel rely for error: 1. Upon the charge of the court below to the effect that if the jury believed from the evidence that plaintiffs had so extracted the waters in Lawson's ravine by means of their dam as to create a nuisance to those working in the neighborhood, who were first in their location of claims upon the ravine, then the jury should find for the defendants.

I deem the instructions given by the court to have been proper. The statute of this state defining what are nuisances and prescribing a remedy by action does not take away any common-law remedy in the abatement of nuisances which the statute does not embrace.

The rules of the common law were so far adopted in this state as to supply any defect which might exist in the statute laws by furnishing additional remedies for the correction of wrongs. It matters but little whether the nuisance complained of in this cause is called private or public at the common law; if either, it could be abated by the party aggrieved if performed without a breach of the peace. Blackstone defines a nuisance and its remedy thus: "Whatsoever unlawfully annoys or doth damage to another is a nuisance, and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as to commit no riot in the doing;" 3 Bla. Com. 5. So it has been held in the English courts that "if a person upon his own soil erect a thing that is a nuisance to another, as by the stopping a rivulet, and thus diminish the water used by his cattle, the party injured may enter upon the soil of the other and abate the nuisance:" *Raikes v. Townsend*, 2 Smith, 9; Com. Dig., tit. Pleader. So the general doctrine has been held in *Hart v. Mayor of Albany*, 9 Wend. 571 [24 Am. Dec. 165]. The same doctrine is also held in Angell on Watercourses, p. 426, that a private nuisance may be abated by the party aggrieved, if it is done peaceably and without a breach of the peace.

The obstruction of the water in the Lawson ravine was a common injury to many at work upon the ravine, who had, by the necessary implication of the laws of the state which relate to mines and miners, a species of property in their mining grounds, which they had a right to protect (if they were first in the appropriation of the water for mining uses) by peaceably abating the nuisance. It might also be well deemed a private nuisance as to the particular mining grounds of defendants injured by the obstruction (as in the case above of one obstructing a rivulet out of which another's cattle drank), and being such a nuisance and hinderance to the enjoyment of a recognized property in this state, the defendants had a right to remove the dam, if done in a peaceable manner. We will not permit ourselves to go behind the verdict of the jury to ascertain the facts as to the priority of the parties in their location upon the ravine. From the verdict of the jury this court will presume that the

defendants were proved to have had the oldest right to the natural flow of the water in the ravine. Whether the purchase of Laird was proper or not could make no difference in this cause. Laird proceeded with others, who were made defendants in the action, to remove the dam, all of whom asserted rights which they claim to have vested prior to the erection of the same by plaintiffs.

I consider that the points made upon appeal are not well taken, and the judgment of the court below must be affirmed with costs.

HEYDENFELDT, J., concurred.

PRIORITY OF APPROPRIATION IS RULE OF PROPERTY respecting water rights and mining claims on public lands in California: See *Irwin v. Phillips*, *infra*; *Hill v. Newman*, *post*, p. 140, and the cases cited in the notes; and see note to *McClintock v. Bryden*, *ante*, p. 91.

ABATEMENT OF NUISANCES: See *Gray v. Ayres*, 32 Am. Dec. 107, and note; *Weismore v. Tracy*, 28 Id. 525; *Gates v. Blincoe*, 26 Id. 440; *Rung v. Shoneberger*, Id. 95; *Hart v. Mayor of Albany*, 24 Id. 165.

STATUTORY REMEDY IS CUMULATIVE WHEN REMEDY AT COMMON LAW EXISTED BEFORE.—The principal case is cited to this point in *State v. Wilson*, 43 N. H. 417. See *People v. Craycroft*, 56 Am. Dec. 33, and note citing prior cases; *Donnell v. Jones*, 48 Id. 59, and cases cited in the note; in the case of nuisances, see *State v. Wilkinson*, 21 Id. 560.

STATUTORY REMEDY FOR STATUTORY RIGHT EXCLUSIVE: See *Troy v. Cheshire R. R. Co.*, 55 Am. Dec. 177; *Bassett v. Carleton*, 54 Id. 605; *Aldrich v. Cheshire R. R. Co.*, 53 Id. 212; *Hickox v. City of Cleveland*, 32 Id. 730; *Calking v. Baldwin*, 21 Id. 168, and notes.

IRWIN v. PHILLIPS.

[5 CALIFORNIA, 140.]

COURTS ARE BOUND TO TAKE NOTICE OF POLITICAL AND SOCIAL CONDITION of the country which they judicially rule.

POLICY OF CALIFORNIA LEGISLATION HAS CONFERRED RIGHT TO DIVERT STREAMS from their natural channels for mining purposes equally as it has conferred the privilege to work the mines.

RIGHT TO MINE AND TO DIVERT STREAMS FOR THIS PURPOSE stand on equal footing, and when they conflict, must be decided by the fact of priority.

MINER MUST TAKE GROUND HE SELECTS AS HE FINDS IT, subject to prior rights which have an equal equity on account of an equal recognition from the sovereign power.

ACTION for diverting water in a running stream. The jury finding the possession of the plaintiff to be anterior to the defendants', under their instructions found for the plaintiff.

Defendants excepted to the rulings of the court, and appealed from the final judgment.

Dunn and Marshall, for the appellants.

J. G. Baldwin and Alexander Anderson, for the respondent.

By Court, HEYDENFELDT, J. The several assignments of error will not be separately considered, because the whole merits of the case depend really on a single question, and upon that question the case must be decided. The proposition to be settled is whether the owner of a canal in the mineral region of this state, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who, subsequent to the diversion, take up lands along the banks of the stream for the purpose of mining. It must be premised that it is admitted on all sides that the mining claims in controversy, and the lands through which the stream runs and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship; and that the miners have the right to dig for gold on the public lands, was settled by this court in the case of *Hicks v. Bell*, 3 Cal. 219.

It is insisted by the appellants that in this case the common-law doctrine must be invoked, which prescribes that a water-course must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being, both at the civil and common law, that the owner of lands on the banks of a watercourse owns to the middle of the stream, and has the right, in virtue of his proprietorship, to the use of the water in its pure and natural condition. In this case the lands are the property either of the state or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that at the common law the diversion of watercourses could only be complained of by riparian owners who were deprived of the use, or those claiming directly under them. Can the appellants assert their present claim as tenants at will? To solve this question, it must be kept in mind that their tenancy is of their own creation, their tenements of their own selection, and subsequent in point of time to the diversion of the stream. They had the right to mine where they pleased throughout an extensive region, and they selected the bank of a stream from which the water had

been already turned for the purpose of supplying the mines at another point.

Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this state the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the state governments, and with the exception of certain state regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold-diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers; as, for instance, in the revenue act "canals and water-races" are declared to be property subject to taxation, and this when there was none other in the state than such as were devoted to the use of mining. Section 2 of article 9 of the same act, providing for the assessment of the property of companies and associations, among others mentions "dam or dams, canal or canals, or other works for mining purposes." This simply goes to prove what is the purpose of the argument, that however much the policy of the state, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal

footing, when they conflict, they must be decided by the fact of priority, upon the maxim of equity, *Qui prior est in tempore, potior est in jure*. The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

It follows from this opinion that the judgment of the court below was substantially correct, upon the merits of the case presented by the evidence, and it is therefore affirmed.

MURRAY, C. J., concurred.

RIGHT TO MINING CLAIMS AND RUNNING WATER ON PUBLIC LANDS IN CALIFORNIA is determined by priority of appropriation: See *Hill v. Newman*, *post*, p. 140; see also *Stiles v. Laird*, *ante*, p. 110; note to *McClintock v. Bryden*, *ante*, p. 91. The principal case is cited to this point in *Crandall v. Woods*, 8 Cal. 141, 143; *Rogers v. Soggs*, 22 Id. 453, 455; and upon the general proposition that the right of using and diverting water for mining purposes on public lands is to be decided by priority of appropriation, in *Atchison v. Peterson*, 20 Wall. 513. In *Thorp v. Freed*, 1 Mont. 685, the principal case was distinguished as to the right of diverting water. The common law respecting riparian rights did not apply in the principal case, it is said, because to neither of the contestants did the realty belong. In that case, however, the government having parted with its title, and the parties being owners in fee of their respective parcels of land, this fact controlled the case, and brought it within the common-law rule. To the point that priority of occupancy gives right of peaceable enjoyment of public lands, or of anything incident thereto, except in the case where the rights of the agriculturist are made to yield to those of the miner, the principal case is cited in *Tartar v. Spring Creek etc. Co.*, 5 Cal. 398; *Burdge v. Underwood*, 6 Id. 46. And upon this last point, see the note to *McClintock v. Bryden*, *ante*, p. 91.

PRIOR APPROPRIATION OF WATER IN RUNNING STREAM: See cases in this series cited in the note to *Hill v. Newman*, *post*, p. 140.

COURTS TAKE JUDICIAL NOTICE OF POLITICAL AND SOCIAL CONDITION OF COUNTRY. The principal case is cited to this effect in *Merced Mining Co. v. Fremont*, 7 Cal. 325. See, upon this point, the note to *McClintock v. Bryden*, *ante*, p. 91.

GUSHEE v. LEAVITT.

[5 CALIFORNIA, 160.]

IN DEFENSE TO ACTION ON PROMISSORY NOTE, IT IS NOT SUFFICIENT TO PLEAD, in general terms, want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under

which the note was given, and point out the facts which constitute the fraud.

PLEA IS BAD WHICH ALLEGES THAT NOTE SUED ON is property of another than the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner which could not be set up against the plaintiff.

ACTION on promissory note. The opinion states the case.

B. S. Brooks, for the appellant.

Holladay, Saunders, and Cary, for the respondent.

By Court, HEYDENFELDT, J. In defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud.

Nor is it a good plea to allege that the note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff.

Judgment affirmed.

Murray, C. J., concurred.

GENERAL PLEA OF FRAUD IN ACTION ON PROMISSORY NOTE was held good in *Hildreth v. Tomlinson*, 50 Am. Dec. 510.

PLEA OF FAILURE OF CONSIDERATION OF NOTE: See *Edelin v. Clarkson*, 38 Am. Dec. 177; *Barrows v. Yount*, 39 Id. 439. Plea of mistake in consideration is not sufficient unless it states facts: *Gains v. Park*, 38 Id. 185. So of the illegality of the consideration: *Dickson v. Burk*, 44 Id. 521.

WESTON v. BEAR RIVER AND AUBURN WATER AND MINING CO.

[5 CALIFORNIA, 186.]

NO TRANSFER OF STOCK IS VALID AGAINST THIRD PARTIES until the same shall have been entered upon the books of the corporation, under the California statute concerning corporations.

ASSIGNMENT BY MERE DELIVERY OF CERTIFICATES OF STOCK is not sufficient to defeat the rights of an attaching creditor of the assignor under the California statute concerning corporations.

APPEAL from the district court of the sixth judicial district, Sacramento county. The opinion states the case.

William S. Long and Tbd Robinson, for the appellant.

Edwards and English, for the respondents.

By Court, MURRAY, C. J. The twelfth section of the act concerning corporations, passed on the twenty-second of April, 1850, provides that "whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued, such shares may be transferred by indorsement and delivery of the certificates thereof, such indorsement being by the signature of the proprietor or his attorney or legal representative; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered on the books of the corporation as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer." And section 144 of the same act is as follows: "It shall be the duty of the trustees of every such corporation or company to cause a book to be kept by the treasurer or clerk thereof, containing the names of persons, alphabetically arranged, who are, or shall within six years have been, stockholders of such company, and showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares, and the amount of stock actually paid in," etc.; "and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, according to the provisions of this act, until it shall be entered therein as required by this section, by an entry showing to and from whom transferred."

In the present case, it is contended that an assignment by mere delivery of the certificates of stock is sufficient to defeat the rights of an attaching creditor. The position assumed by the respondents' counsel is, that the sections of the act above referred to were intended for the protection and government of the incorporation, and cannot be extended to transfers between third parties. That the person to whom the certificates have been delivered has an equitable interest in the stock, which cannot be divested by any subsequent proceedings. In support of this position, a number of authorities have been cited, some of which I propose briefly to review.

In the case of the *United States v. Cutts*, 1 Sumn. 138, the language of the act was, "that the stock shall be transferable only on the books of the treasurer," etc. In commenting on this statute, the court said: "It seems that the true interpretation of the statute is that, so far as the United States and the proprietors are concerned, no transfer is to be considered as

complete and perfect, so as to pass the legal ownership of the stock and make the purchaser the legal owner, until the transfer has been entered upon the public books. No person can transfer the same as such owner, or entitle himself to receive the dividends, unless he stands as a recorded proprietor upon these books. And there is a manifest propriety and policy in this view in making the provision, as it would avoid, on the part of the government, all inquiries into and examinations of any equitable or other titles, or liens, set up as acquired under a proprietor, by any third person dealing with him. This object may be well effected without in the slightest degree interfering with the validity of any equitable titles or liens acquired under any agreement between the proprietor and third persons, so far as it regards them respectively. And it would sound harsh to hold all such agreements between the proprietor and his creditor, or between him and a purchaser, utterly void, *inter se*, unless there were a very plain and direct expression in the statute to that effect, which in this case there certainly is not."

The reasons thus given by Judge Story, as well as the difference between the phraseology of the act of 1790 and the act now under consideration, fully justify the opinion of the court; but there is, I think, little or no analogy between the cases.

In the case of the *Bank of Utica v. Smalley*, 2 Cow. 777 [14 Am. Dec. 526], it was held that a transfer of bank stock was good as between vendor and vendee, though the act of incorporation provided that no such transfer should be valid or effectual until registered in a book to be kept by the bank for that purpose; and that the debts due from the vendor to the bank should be first paid. In this case the court said: "This provision was intended exclusively for the benefit and protection of the bank. Their lien upon the stock for any debts due them cannot be affected by any transfer of the stock; and the only notice of a transfer which they are bound to regard is a registry of it on their books."

The case of *Quiner v. Marblehead Social Insurance Company*, 10 Mass. 480, as well as that of *Sargent v. Essex Mar. Railroad Corporation*, 9 Pick. 204, support substantially the same doctrine.

I have examined several other authorities cited by the respondents' counsel, which maintain the general doctrine of equitable assignments of this kind of property or choses in action. But I have found no case where such transfer has been held good in the face of such an act of incorporation as that of this state. I shall not dispute that, in the absence of legislation, the transfer

of the certificates of stock would be valid; but I regard the statute as imperative in its prohibition. By every rule of construction, the exception excludes every other transfer, and, as a necessary sequence, no transfer is good against third parties unless the same be made on the books of the company. It seems to me that it cannot be fairly contended that this provision was designed as a protection to the company alone. It appears to be sufficiently protected by the one hundred and fourteenth section, which makes the person to whom it is transferred liable for the debts of the company; and by the further provision of the same act, authorizing the directors by by-law to provide for the transfer of such stock; under this latter provision, it would be competent for the company to protect themselves to the fullest extent against imposition or accident.

This alone would be sufficient for practical purposes, and it is not assuming too much to say that, after having delegated to corporations the power of regulating such transfers for their own protection, in going further and employing words of exclusion, the legislature intended to protect the public from the frauds which might be perpetrated by a sale or hypothecation of the certificates passing the legal or equitable title, while the books of the company induced credit to the vendor by holding him out to the world as the owner of such stock.

The conclusion to which I have thus arrived renders it unnecessary to examine any of the other points presented.

Judgment reversed, with costs.

BRYAN, J., concurred.

HEYDENFELDT, J., dissented.

TITLE TO STOCK IN CORPORATION PASSES WITHOUT TRANSFER ON BOOKS OF CORPORATION as between vendor and vendee, although a clause in the act of incorporation provides that stock shall be transferable only on the books of the company, such clause being merely for the benefit of the corporation: *Duke v. Cahawba N. Co.*, 44 Am. Dec. 472; *Commercial Bank v. Kortright*, 34 Id. 317. The transferee will not become a stockholder prior to such entry on the books of the company: *State v. Harris*, 36 Id. 460.

CITATIONS OF PRINCIPAL CASE.—The statute of Wisconsin respecting transfers of stock is the same as the California statute, and the decision of the principal case, that no transfer is good against third parties unless the same be made on the books of the company, was adopted in *Application of Thomas Murphy*, 51 Wis. 525. In *Weston v. Bear River etc. W. & M. Co.*, 6 Cal. 429, where the principal case again came before this court, it was held that the transfer, as in the principal case, was binding upon a subsequent purchaser at the sale of the chattel under the attachment who had notice of the assignment. In *Parrott v. Byers*, 40 Id. 625, it is said: "The point decided in

that case [the principal case] was that a transfer of the certificate of stock without an entry on the books was void against a subsequent attaching creditor of the assignor. In the case between the same parties, 6 Cal. 425, it was held that the transfer was valid as against a subsequent assignee who took with notice of the prior assignment." Such transfers are valid against the world, except subsequent purchasers in good faith without notice: *Id.*; *People v. Elmore*, 35 Id. 655; *Naglee v. Pacific Wharf Co.*, 20 Id. 533; see *Parrott v. Byers*, 40 Id. 625; all citing and affirming the principal case to that extent. In *Pendergast v. Bank of Stockton*, 2 Saw. 116, Sawyer, C. J., said: "In *Weston v. Bear River & A. W. & M. Co.*, 5 Cal. 189, and in *People v. Crockett*, 9 Id. 115, language similar to that now under consideration, in the act of 1850, Stats. 1850, p. 347, sec. 1, and in the act for incorporating railroad companies, *Id.* 1853, p. 104, sec. 14, was regarded by the supreme court of the state as authorizing the corporation to make by-laws forbidding the transfer of stock till all the indebtedness of the owner to the corporation should be liquidated. It is true, the point was not necessarily involved in these cases, but it is clear that the court took this view of the statute." The principal case, as reported in 6 Cal. 425, was cited in *Strout v. Natoma Water and Mining Co.*, 9 Id. 80, to the point that no transfer of shares in the capital stock of a corporation is good as against third parties, unless such transfer be entered on the books of the corporation.

WOLF v. FLEISCHACKER.

[5 CALIFORNIA, 244.]

HOMESTEAD STATUTE DOES NOT CONTEMPLATE THAT HOMESTEADS BE CARVED out of land held in joint tenancy or tenancy in common, when it provides no mode for their separation and ascertainment.

Motion for writ of assistance by Israel E. Wolf and George H. Davis against Samuel Fleischacker, who is the appellant. The opinion states the case.

McConnell and Stewart, and C. M. Broenan, for the appellant.

Cordoso and Labatt, for the respondents.

By Court, HEYDENFELDT, J. This was a motion for a writ of assistance to put in possession of the land a purchaser under a decree of foreclosure of a mortgage, given to secure the payment of the purchase money. It is resisted on the ground that the land is a homestead, and the wife did not join in the mortgage. The mortgage is upon the whole land to secure the purchase money for two thirds of it undivided, the mortgagor being at the time the owner of one undivided one third. The homestead act requires the homestead to consist of a quantity of land, with the dwelling-house, etc., not exceeding in value five thousand dollars, to be selected by the owner thereof, etc.

In this case the defendant was the owner of an undivided one

third. He held as joint tenant, having jointly purchased with two others. It required the title of the three to constitute an ownership of the land, and there was no part of it which he had the power to set apart as his own so as to constitute a homestead. The right of each of the other joint tenants was as great to the whole as his own right.

The statute did not contemplate that homesteads should be carved out of land held in joint tenancy, or tenancy in common, because it has not provided any mode for their separation and ascertainment. All of the questions of excess of value, appraisement, and division between debtor and creditors would arise only to give complexity to a state of facts for which no provision of the statute seems to be adequate, and would necessarily force into litigation, or at least into care and trouble, the innocent co-tenants, who would thus be subjected to annoyance without any fault of their own. If the policy of the law was to extend to such cases, it would be more clear and explicit in its declarations, so that joint owners of land would at least be made aware of an additional contingency attached to the form of their title.

Judgment affirmed.

MURRAY, C. J., and BEYAN, J., concurred.

CONSTITUTIONALITY OF HOMESTEAD EXEMPTION STATUTES: See note to *Rockwell v. Hubbell's Adm'res*, 45 Am. Dec. 252.

THE PRINCIPAL CASE IS CITED AND FOLLOWED in *Reynolds v. Pixley*, 6 Cal. 167; *Giblin v. Jordan*, Id. 417; *Kellereberger v. Kopp*, Id. 565; *Bishop v. Hubbard*, 23 Id. 517; *Elias v. Verdugo*, 27 Id. 425; *Seaton v. Son*, 32 Id. 483; *West v. Ward*, 26 Wis. 581. The principal case is also cited in *Thorn v. Thorn*, 14 Iowa, 54; *Greenwood v. Maddox*, 27 Ark. 660; but those cases hold, contrary to the principal case, that a homestead may be claimed by a joint tenant or tenant in common, on the ground that under the statutes of the states wherein the decisions were made no trouble concerning partition would be met with. It is cited upon the point decided in *In re Parks*, 9 Nat. Bank. Reg. 273. In *In re Blodgett & Sanford*, 10 Id. 147, it is cited to the point that there is no separate exemption to the individual members of a firm out of undivided partnership property.

UNDIVIDED INTEREST IN LANDS, WHETHER HOMESTEAD RIGHTS CAN ATTACH TO.—In Freeman on Cotenancy and Partition, sec. 54, it is said: "Whether homestead rights can attach to an undivided interest in lands, in the absence of an express provision of the statute to that effect, is a question on which the judges have not agreed. On the one hand, it has been thought that the provisions of the homestead law contemplated that the interest to which they should be applied should be susceptible of an enjoyment in severalty. When the value of the land claimed exceeds in amount the limit of the homestead right, the statute provides means by which the homestead may be segregated; and that, as segregated, it may be set off to the judgment debtor.

No such segregation could take place when the interest of the claimant was in a moiety only, for in that case there is no place which he can lawfully take into his exclusive possession. For these reasons, the claim of a co-tenant to a homestead has been denied in many of the cases in which it has been questioned: *West v. Ward*, 26 Wis. 580; *Wolf v. Fleischacker*, 5 Cal. 244 [the principal case]; *Elias v. Verdugo*, 27 Id. 418; *Reynolds v. Pixley*, 6 Id. 167; *Kellersberger v. Kopp*, Id. 565; *Bishop v. Hubbard*, 23 Id. 517; *Ward v. Hahn*, 16 Minn. 161; *Thurston v. Maddocks*, 8 Allen, 429; *Kingsley v. Kingsley*, 39 Cal. 665. In California, the doctrine that a homestead could not be acquired in undivided property was frequently enforced, and was applied in some extreme cases. In one instance the lands attempted to be dedicated as a homestead belonged to the husband and wife and their child as tenants in common. The court could see no distinction between this case and one in which the co-tenants were entire strangers to each other: *Giblin v. Jordan*, 6 Id. 417. In another instance the homestead had been acquired under a conveyance purporting to convey the same in severalty, and was acquired and held under the claim and belief, on the part of the occupant, that he was the sole owner. The court could not understand that these facts authorized any exception to the general rule: *Seaton v. Son*, 32 Id. 483. And where when acquired the homestead was held in severalty, the conveyance of an undivided interest, because it turned the homestead into a co-tenancy, was deemed an abandonment of the homestead: *Kellersberger v. Kopp*, 6 Id. 565. On the other hand, in several of the states a homestead claim upon an undivided interest has been sustained, and all distinction in this respect between estates in severalty and estates in co-tenancy denied: *Horn v. Tufts*, 39 N. H. 483; *Thorn v. Thorn*, 14 Iowa, 53; *McClary v. Bixley*, 36 Vt. 254; *Greenwood v. Maddox*, 27 Ark. 660; *Robinson v. McDonald*, 11 Tex. 385. In California, the state in which the claim of a co-tenant to exemption was first denied, the legislature so changed the statute that a part owner could hold as a homestead lands of which he was in the exclusive possession: Stats. 1868, p. 116. But we see no sufficient reason, even in the absence of statutes directly bearing upon the subject, for holding that a general homestead act does not apply to lands held in co-tenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other co-tenant, and that the maintenance of such claim might interfere with proceedings for partition, form no very satisfactory reason for denying the exemption. If the rights of the other co-tenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. But as long as his interests are respected, or so nearly respected that he feels no inclination to complain, why should some person having no interest in the co-tenancy be allowed to avail himself of the law of co-tenancy for his own and not for a co-tenant's gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to insure the unfortunate debtor, and his equally unfortunate but more helpless family, the shelter and influence of home. A co-tenant may lawfully occupy every parcel of the lands of the co-tenancy. He may employ them not merely for cultivation or for other means for making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may, of right, occupy and enjoy the premises with him. Upon the land of which he is but a part owner he may, and in fact he frequently does, obtain all the

advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because the other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has." See also 1 Wash. on Real Prop. 338; Smyth on Homesteads, 120-128; Thompson on Homesteads, 180-189, citing the above extract from Freeman on Cotenancy and Partition, sec. 181.

Under the California statute of 1868, mentioned in the above quotation from Freeman on Cotenancy and Partition, a homestead on lands held in co-tenancy can be selected, or a homestead previously selected be validated, only where the party claiming the same is in the exclusive occupation and possession of the tract sought to be dedicated and has the same inclosed: *Roussel v. Green*, 54 Cal. 138; *Cameto v. Dupuy*, 47 Id. 79. So where the husband's part interest had been foreclosed under a mortgage before the passage of this act, its provisions could be of no avail to validate a previously declared homestead: *First Nat. Bank of Santa Barbara v. De la Guerra*, 61 Cal. 109. The wife may claim a homestead on the husband's undivided interest, when he holds it under the prescribed conditions of exclusive occupancy: *Higgins v. Higgins*, 46 Id. 259, and see Civ. Code, sec. 1238. The substance of a homestead is a parcel of land on which the family reside. It is constituted by the attributes of residence and selection according to law: *Ham v. Santa Rosa Bank*, 69 Cal. 125, 138.

In addition to the cases above cited, the following hold that the homestead-exemption statute may attach to undivided interests in realty: *Sentell v. Armor*, 35 Ark. 49; *Sims v. Thompson*, 39 Id. 301; *Ward v. Mayfield*, 41 Id. 94; *Hewitt v. Rankin*, 41 Iowa, 35, 44; *Tarrant v. Swain*, 15 Kan. 146; *Meguiar v. Burr*, 15 Rep. 554 (Ky.); *Lozo v. Sutherland*, 38 Mich. 168, 172 (but see *Amphlett v. Hibbard*, 29 Id. 298); *Kaser v. Haas*, 27 Minn. 406 (distinguishing *Ward v. Huhn*, 16 Id. 159, as not in conflict); *McGrath v. Sinclair*, 55 Miss. 89; *Lacy v. Clements*, 36 Tex. 663; *Smith v. Deschaumes*, 37 Id. 429, 430; *Williams v. Wethered*, 37 Id. 132; *Ferguson v. Reed*, 45 Id. 574; *Clements v. Lacy*, 51 Id. 150; *Jenkins v. Volz*, 54 Id. 636; *Danforth v. Beattie*, 43 Vt. 138; *Johnson v. May*, 16 Nat. Bank. Reg. 425 (Vt.). In one of these cases it is held that since an estate of homestead in an undivided interest in land is not liable to a forced sale, in a suit to foreclose a mortgage on the land, a plea setting up such interest, and stating facts showing an inability to designate the boundaries of the homestead estate before partition, presents a valid defense: *Jenkins v. Volz*, 54 Tex. 636. A partner cannot, on the dissolution of the firm, assert a right of homestead in an entire tract owned in common by the partnership, so as to exempt it wholly from the partnership liabilities to third persons, or to members of the firm; his homestead right extends only to the quantity of his estate: *Smith v. Chenault*, 48 Tex. 455.

On the other hand, it is held in the following cases that the homestead right cannot attach to an undivided interest in land: *Ventress v. Collins*, 28 La. Ann. 783; *Simon v. Walker*, Id. 608; *Barron v. Solitvellos*, Id. 855; *Siloway v. Brown*, 12 Allen, 30; *Bates v. Bates*, 97 Mass. 392, 395; *Bemis v. Driscoll*, 101 Id. 421; *Amphlett v. Hibbard*, 29 Mich. 298 (but see *Lozo v. Sutherland*, 38 Id. 168, 172); *Terry v. Berry*, 13 Nev. 514 (followed in *Commercial and Savings Bank v. Corbett*, 5 Saw. 543). The case of *Terry v. Berry*, *supra*, was based upon *Sealon v. Son*, 32 Cal. 481. See, however, *Re Swearinger*, 17 Nat. Bank. Reg. 138, where it was held that the homestead law of Nevada did apply to undivided part interests; *Avans v. Everett*, 3 Lea, 76; see *Edwards v. Edwards*, 14 S. C. 11. In *Branin v. Womble*, 32 La. Ann. 805, 810, it was

held that the fact of the homestead claimant afterward acquiring the remaining undivided interest will not render any part of the property exempt as against a mortgage given upon the undivided interest. The mortgagor might rely, it was said, upon the fact that as his mortgagor owned only an undivided part, this interest could not become exempt by means of a homestead claim. The contrary of this would, perhaps, prevail in a state where holders of undivided interests are allowed the benefit of the statute: See *Santell v. Armor*, 35 Ark. 49; *Sims v. Thompson*, 39 Id. 301.

CONVEYANCE OF PART INTEREST AS AFFECTING HOMESTEAD RIGHT.—In California, as we have seen (see extract from Freeman on Cotenancy and Partition, *supra*), the conveyance of a part interest in the homestead land constituted an abandonment of the homestead: *Kellersberger v. Kopp*, 6 Cal. 565. This has also been held in Massachusetts, where the homestead right does not attach to a part interest: *Bates v. Bates*, 97 Mass. 392, 395. Where, however, the homestead right may attach to an undivided interest, a conveyance of an undivided interest in property held in severalty is not an abandonment: *Horn v. Tufts*, 39 N. H. 478; *Ferguson v. Reed*, 45 Tex. 584.

PROTECTION OF CO-TENANT.—Where an undivided interest in land may become exempted under the homestead law, the co-tenant declaring the homestead should not, by this means, be allowed to infringe upon the rights of his co-tenant. This is quite generally expressed by those who contend that the homestead exemption should cover undivided landed interests: See extract from Freeman on Cotenancy and Partition, *supra*. So the California statute of 1868 provides that the co-tenant claiming the homestead must be in the exclusive possession of a portion of the land. So in *McGrath v. Sinclair*, 55 Miss. 89, it is said that a joint tenant may have a homestead in property which, with the consent of his co-tenant, he occupies as tenant in common. Joint tenants living in separate buildings are each entitled to a homestead: *Meguiar v. Burr*, 15 Rep. 554 (Ky.). In Kansas and Texas it is held that the only limitation is that a tenant in common can obtain no such homestead interest as will interfere with the rights or interests of his co-tenant: *Tarrant v. Swain*, 15 Kan. 146; *Ferguson v. Reed*, 45 Tex. 574; *Clements v. Lacy*, 51 Id. 150. The declaration of homestead must be without prejudice to claimant's co-tenants: *Williams v. Wethered*, 37 Tex. 132; *Smith v. Deschaumes*, Id. 429, 430. In the latter case it is said that a tenant in common can, with the consent of his co-tenant, acquire a homestead in the common property against all the world except his co-tenant. And, on partition, equity will respect the rights of the improving tenant and give him the benefit of his homestead improvements wherever it can be done without prejudice to the other co-tenants: *Williams v. Wethered*, 37 Tex. 132; *Smith v. Deschaumes*, Id. 429; *Clements v. Lacy*, 51 Id. 150.

BEARD v. KNOX.

[5 CALIFORNIA, 252.]

HUSBAND CANNOT, BY DEVISE OR WILL, DEFEAT WIFE'S RIGHT TO ONE HALF OF COMMUNITY PROPERTY under California statute, which gives the husband entire control of the community property, with absolute power to dispose of it, but provides that upon the dissolution of the community, by the death of either husband or wife, one half the community property shall go to the survivor.

HALF-INTEREST IN COMMUNITY PROPERTY, UNDER CALIFORNIA STATUTE, IS A SUBSTITUTE FOR THE COMMON-LAW RIGHT OF DOWER.

HUSBAND AND WIFE, DURING COVERTURE, ARE JOINTLY SEIZED OF COMMUNITY PROPERTY in California, the wife's half-interest being subject only to the husband's disposal during their joint lives.

WIFE RESIDING WITHIN STATE HAS NO GREATER PRIVILEGES RESPECTING COMMUNITY PROPERTY than one residing without state, under the California statute.

DOMICILE OF HUSBAND IS DOMICILE OF WIFE.

WIFE, BY ACCEPTING LEGACY UNDER HUSBAND'S WILL, which assumes to dispose of the whole community property, is not estopped from setting up her claim to one half the property. She is entitled to her own share of the common property, and to the legacy out of her husband's share.

OBJECTION ON NON-JOINDER OF PARTIES MUST BE TAKEN ADVANTAGE OF BY DEMURRER, and comes too late on appeal from the final judgment.

ACTION by Rachel Beard against William J. Knox, the executor of William M. Beard. The complaint alleges that the plaintiff, Rachel Beard, intermarried with William M. Beard, deceased, in Illinois, in 1840; that there was no marital contract by which any separate provision was secured to the plaintiff; that in 1849 William M. Beard came to this state, where he lived until his death; that the plaintiff never resided in this state; that in December, 1853, William M. Beard died in the town of Nevada, leaving real and personal property valued at twelve thousand dollars, which he had acquired since 1850; that he left a will, by which he bequeathed to his wife, the plaintiff, five hundred dollars, and the residue of the estate, with the exception of a few legacies, to Harriet A. Beard, the infant daughter of the testator and the plaintiff. The receipt of the legacy of five hundred dollars was admitted by the plaintiff. Upon these facts the plaintiff prayed judgment for one half the common property then in the possession of the defendant as executor, independent of the legacy of five hundred dollars. The defendant's demurrer to this complaint was overruled, and from the final judgment entered thereupon the defendant appealed.

Searles, Dunn, and Smith, for the appellant.

Tweed and Niles, for the respondent.

BY COURT, MURRAY, C. J. The statute of this state, defining the right of husband and wife, passed April 17, 1850, provides that "all property, acquired by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." It is further provided that the husband shall have the entire control of the common property,

with absolute power to dispose of it, and upon the dissolution of the community, by death of either the husband or wife, one half of the common property shall go to the survivor, etc.

The first question raised is as to the power of the husband to convey the common property by devise or will, and thus defeat the rights of the surviving wife. This we have no hesitation in saying cannot be done. Our statute has done away with the common-law right of dower, and substituted in place a half-interest in the common property. This liberal provision was intended for the benefit of the wife; and the intention of so humane and beneficent a law should not be defeated by adopting a rule of construction which would leave the future maintenance of herself and family entirely at the caprice of the husband.

The words "with absolute power to dispose of" ought not to be extended to a disposition by devise. The husband and wife, during coverture, are jointly seized of the property, with a half-interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it, for such a conveyance can only operate after death, upon the very happening of which the law of this state determines the estate, and the widow becomes seized of one half of the property.

The appellant relies on the words of the statute, "shall reside and acquire property," and seems to think that this provision was intended to give greater privileges to those wives actually living or residing in the state than was conferred on those not actually resident. In *Kashaw v. Kashaw*, 3 Cal. 812, we held the domicile of the husband was the domicile of the wife in contemplation of law, and that it was not necessary that she should be an actual resident in the state. The reasoning of that case will apply with equal force to the present, and it can hardly be supposed that the legislature intended to deprive the wife of all right to the husband's estate, as a penalty for not residing in the state, which would be the necessary result if the appellant's construction was correct. But it is urged that by accepting the legacy the plaintiff is estopped from setting up a claim to one half of the estate. It is a familiar principle that an heir cannot take as a legatee, and afterwards dispute the validity of the will; but this principle does not apply in the present case. The deceased had no authority to dispose of but one half of the property; this he might do to whomsoever he

pleased. The plaintiff does not contest that right, but only seeks to withdraw her own property from the operation of a conveyance which, it is claimed, has despoiled her of it. This she may do with the greatest propriety, as the legacy received by her was part of her husband's estate, and not her own.

The objection that there is a non-joinder of parties comes too late; it should have been taken advantage of by demurrer.

The judgment of the district court is affirmed, except as to the five hundred dollars, which it is directed to allow out of the estate of the deceased, and not out of the wife's moiety.

HEYDENFELDT and BRYAN, JJ., concurred.

DOMICILE OF HUSBAND IS DOMICILE OF WIFE: *Hairston v. Hairston*, 61 Am. Dec. 530; *Harrison v. Harrison*, 56 Id. 227, and note 235, collecting prior cases.

CONVEYANCE BY HUSBAND OF JOINT PROPERTY DOES NOT DIVEST WIFE'S INTEREST AT COMMON LAW: *Needham v. Branson*, 44 Am. Dec. 45; *Miller v. Miller*, 33 Id. 157; and see *Fairchild v. Chastelleux*, 44 Id. 117; *Jackson v. McConnell*, 32 Id. 439; *Wyckoff v. Gardner*, 45 Id. 388. Conveyance of community property: See note to *Thayer v. Thayer*, 39 Id. 220.

NON-JOINDER OF PARTIES, HOW AND WHEN TAKEN ADVANTAGE OF: See *Hisman v. Hapgood*, 43 Am. Dec. 663, and note citing prior cases 664. It is matter in abatement: *State of Indiana v. Woram*, 40 Id. 378; *Campbell v. Wallace*, 37 Id. 219. Plea in abatement is the proper method to take advantage of the non-joinder of a partner: *Deal v. Bogue*, 57 Id. 702, and note 707. In case of a bill in equity, see *Southern Life Ins. & T. Co. v. Lanier*, 58 Id. 448.

THE PRINCIPAL CASE IS CITED AND FOLLOWED to the point that in California the community property cannot be disposed of by the husband in his will so as to defeat the right of the wife to one half thereof: *Guttmann v. Scannell*, 78 Cal. 459; *In re Buchanan's Estate*, 8 Id. 510; *Smith v. State*, 12 Id. 225; *Scott v. Ward*, 13 Id. 469; *Payne v. Payne*, 18 Id. 301; *De Godey v. Godey*, 39 Id. 164. In *Morrison v. Bowman*, 29 Id. 348, 349, it is held that if the wife elects to take under her husband's will that disposes of the whole of the community property, she loses all her right in the community property, if an assertion of this right would necessarily defeat the objects of the will, and affirms the principal case on the ground that the acceptance of the legacy by the widow was not inconsistent with her claim to one half of the common property.

COIT v. HUMBERT.

[5 CALIFORNIA, 260.]

PARTY, BY PLEDGING NEGOTIABLE SECURITIES TRANSFERABLE BY DELIVERY, loses all right to the securities when transferred by the pledgee in good faith to a third party.

WARRANTS DRAWN BY OFFICERS OF GOVERNMENT UPON ITS DISBURSING OFFICERS, having been pledged, may be held against the original owner by one acquiring them in good faith from the pledgee.

APPEAL from the district court of the twelfth judicial district, San Francisco county. The opinion states the case.

B. S. Brooks, for the appellant.

Crockett and Page, for the respondent.

By Court, BRYAN, J. This cause was heard in the court below upon demurrer. The appellant having received warrants payable to his order, drawn upon the treasury of the county of San Francisco, as also warrants payable to the order of others and indorsed to him in blank, pledged the same to another as security for a loan. The pledgee, one West, also pledged the same as security for a loan had by him of Curtis & Perry, and Curtis & Perry transferred the same to the respondent Humbert.

The appellant having set up these facts in his complaint, and claiming to be the owner of the scrip or warrants, prays the court to decree that the defendant shall surrender to him the same, alleging his readiness to pay the amount of money due from him to West, with interest.

A party by pledging negotiable securities, transferable by delivery, loses all right to the securities when transferred by the pledgee in good faith to a third party. So it has been laid down in Story on Bailments, sec. 322: "If the pledge is of a certificate of stock which may pass by delivery, a *bona fide* purchaser or subsequent pledgee may hold the stock against the real owner." The same doctrine is also held in *Jarvis v. Rodgers*, 13 Mass. 105, and in Story's Eq. Jur., secs. 434, 436.

This doctrine is held from the plainest reason and necessity of the thing. For if it were otherwise, no person receiving such security would be safe. In the first place, the person receiving would be obliged to ascertain (what in most instances it would be impossible to ascertain) whether the security belonged to the person from whom he received it, or was only deposited as security with him by some other person. Although warrants drawn by officers of a government upon its disbursing officers might not strictly be called evidence of indebtedness, yet the owner having once pledged them with another, reposing confidence in his pledgee, any person subsequently acquiring them in good faith from such pledgee may hold them against the original owner. The pledgee in such a case should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises.

The complaint shows upon its face that no cause of action

exists against the respondent, and the demurrer was well taken.

Judgment below affirmed with costs.

HEYDENFELDT, J., and MURRAY, C. J., concurred.

ASSIGNMENT OF CHOSE IN ACTION BY WAY OF PLEDGE, or even absolutely, does not transfer the assignor's legal interest: *Blaschard v. Eby*, 24 Am. Dec. 250. So of the deposit of a promissory note: *Garlick v. James*, 7 Id. 294; see *Hunt v. Nevers*, 26 Id. 616.

HUNSAKER v. BORDEN.

[5 CALIFORNIA, 288.]

STATUTE PROVIDING FOR FUNDING OF COUNTY DEBT does not impair the obligation of contracts, the obligation to pay being fully acknowledged, and the right of a person to secure the whole amount of his debt remaining unaffected.

ONE HAS NO RIGHT TO REMEDY AGAINST GOVERNMENT OR SUBDIVISION THEREOF which cannot be taken away by the government.

COUNTY CANNOT SUE OR BE SUED EXCEPT WHERE SPECIALLY PERMITTED by statute, and such permission can be withdrawn or denied at any time the legislature may think proper.

COUNTY DEBT CREATED BY AUTHORITY OF LAW IS PART OF PUBLIC STATE DEBT, and as there may be no remedy against the state, so there may be none against the county.

SOVEREIGN CANNOT BE SUED UNLESS BY ITS OWN CONSENT.

CREDITORS OF STATE HAVE NOTHING TO RELY UPON except her good faith, and she has equally the power to postpone the time of payment or to refuse to pay at all.

APPEAL from the district court of the seventh judicial district, Contra Costa county. The opinion states the case.

H. Mills, for the appellant.

John Currey, for the respondent.

By Court, HEYDENFELDT, J. The plaintiff obtained a *mandamus* compelling the defendant, as treasurer of Contra Costa county, to pay him the amount of certain warrants on the county treasury, drawn by the proper authority in the year 1853.

The defense set up is that by an act passed February, 1855, to fund the debt of Contra Costa county, it is specially provided that all indebtedness accruing or to accrue up to April, 1855, may be funded, that all balances in the treasury at the end of the fiscal year shall be transferred to the credit of the *sinking*

fund, and that it shall not be lawful for the county treasurer to pay or liquidate any of the indebtedness of said county which accrued prior to the first day of February, 1855, in any other manner than in the act provided, that is, by funding.

This defense is complete, unless, as is maintained by the plaintiff, the last cited provision of the act is unconstitutional. In order to sustain this position, it is charged that the act impairs the obligation of contracts. It is difficult to see how, by the act in question, the obligation of the contract is at all impaired; on the contrary, the obligation to pay is fully acknowledged, and the plaintiff's right to secure the whole amount of his debt is unaffected. The only change made is in the mode and time of payment. This seems to be regarded by the respondent as a change in the remedy so material as to affect the right, and we are referred to authorities which hold that the legislature cannot alter a remedy so as to make the right scarcely worth pursuing.

The mistake in the argument is in supposing that the plaintiff had any remedy whatever at any time. A county is not a person in any sense; it is not a corporation. It cannot sue or be sued, except where specially permitted by statute, and such permission can be withdrawn or denied at any time the legislature may think proper. A county government is a portion of the state government, and the county debt created by authority of law is a part of the public state debt; and in the same manner, as there is no remedy against the state, there may be none against the county. The sovereign cannot be sued, in whatever form she may owe, whether through her own principal treasury or one of her subordinate treasuries, unless by her own consent. Her creditors have nothing to rely upon except her good faith, and she has equally the power to postpone the time of payment or to refuse to pay at all.

In the present case the state has exercised a legitimate and unquestionable power. She has provided to fund the debt of one of her subordinate governments, after a review of its condition, in a manner which protects the debtor from loss, and which will in time relieve the county treasury from its burden of indebtedness, by a plan which indicates the soundest legislative wisdom.

The holders of the warrants on the county treasury are not compelled to accept bonds for them; or, in other words, to fund them; they are simply left unprovided for in any other way. It would amount to the same thing if the state legislature merely

repealed the act giving the county authorities power to levy and collect tax upon that portion of her citizens.

The power to tax is one of the highest attributes of sovereignty, and may or may not be exercised at the will of the sovereign. Without such will, and its full and explicit expression, there are no obligations arising from laws or constitutions or circumstances which can produce it.

The judgment is reversed.

MURRAY, C. J., concurred.

CONTRACTS BY INDIVIDUAL WITH STATE CANNOT BE IMPAIRED: *Winter v. Jones*, 54 Am. Dec. 379; *Bruce v. Schuyler*, 46 Id. 447; see *State v. Baltimore etc. R. R. Co.*, 38 Id. 317.

LEGISLATURE MAY CHANGE NATURE AND EXTENT OF REMEDIES ON CONTRACTS: *Bruce v. Schuyler*, 46 Am. Dec. 447. See also *Lycoming v. Union*, 53 Id. 575; *Baugher v. Nelson*, 52 Id. 694, and cases cited in the notes thereto; *Coriell v. Ham*, 61 Id. 134.

SOVEREIGN CANNOT BE SUED UNLESS BY ITS OWN CONSENT: *Michigan State Bank v. Hastings*, 41 Am. Dec. 549; *Divine v. Harvie*, 18 Id. 194. Each state is sovereign: *People v. Coleman*, 60 Id. 581.

THE PRINCIPAL CASE IS CITED in *Sharp v. Contra Costa County*, 34 Cal. 290, 291, to the point that "the state government neither in its general nor local capacity can be sued by her creditors or made amenable to judicial-process except by her own consent; her creditors must rely solely upon her good faith as to the time, mode, and measure of payment;" in *Langford v. King*, 1 Mont. 39, to the point that in the absence of a law of Montana territory or act of congress permitting suit against the territory, no citizen could sue the territory; that therefore there was no obligation to territorial contracts, but they rested simply upon the good faith of the territory; in *Ex parte State*, 52 Ala. 236; *People v. Ingersoll*, 58 N. Y. 46, to the point that a county can neither sue nor be sued except by express power conferred by statute, and the legislature may withdraw this permission at any time; in *Hastings v. City and County of San Francisco*, 18 Cal. 59, to the point that a county cannot sue and be sued except when specially permitted by statute; but the principal case is not in conflict with the view that a board of supervisors, when authorized "to sue and defend on behalf of the county," are not liable to suit in their official capacity for claims against the municipal corporation they represent; in *Rose v. Estudillo*, 39 Id. 275, it is said: "The petitioner cannot be compelled to accept the bonds provided by the funding act; but on the other hand, the county cannot raise the money for his payment unless authorized to do so by law, and the power of taxation the state may authorize or not as it pleases; the revenues raised for other purposes cannot be applied by respondent to pay his debt"—citing the principal case.

MORGAN v. LOWE

[5 CALIFORNIA, 325.]

ASSIGNEE IN GOOD FAITH, FOR VALUABLE CONSIDERATION, OR INVOICE OF GOODS upon which the vendee has paid part of the purchase price, the balance to be paid upon the arrival of the vessel, is entitled to the goods

if he demands the same within a reasonable time after the arrival of the vessel and tenders the balance of the purchase money; and under such circumstances, no notice of the assignment is necessary to charge the vendors.

VENDOR OF GOODS IS LIABLE TO ASSIGNEE OF VENDER if he sells the goods after notice of the assignment and pays the proceeds to the attaching creditors of the vendee, notwithstanding the attachments were served on him before notice of the assignment.

Action by Charles H. Morgan against Lowe, Ebbets & Co., merchants at San Francisco. The defendants sold to S. H. Allen, by memorandum in writing, forty barrels of whisky, to arrive on the ship Golden Fleece. Allen paid a part of the purchase money, and before the arrival of the ship assigned the memorandum of sale to the plaintiff for a valuable consideration. After the arrival of the ship the plaintiff, within a reasonable time, demanded of the defendants the whisky, at the same time tendering the balance of the purchase money. The defendants refused to deliver the whisky, alleging that it had been attached in their hands as the property of Allen. They afterwards sold the whisky, and paid over the proceeds to the attaching creditors. The jury found for the plaintiff. And from an order overruling a motion for a new trial the defendants appealed.

Baldwin and Bowman, for the appellants.

A. M. Hitchcock, for the respondent.

By Court, MURRAY, C. J. The court below properly instructed the jury that if the plaintiff was the assignee in good faith and for a valuable consideration of the invoice of goods in controversy, and had demanded the same within a reasonable time after the arrival of the vessel, and tendered the balance of the purchase money, no notice of such assignment was necessary to charge the defendants.

In a case where the assignee had allowed the party to answer the attachment and the money to be made by the process of the court, the rule would be different. Such is not the fact in the present case. The defendants have undertaken to adjust this matter between themselves and the attaching creditors, to the absolute exclusion of the plaintiff's rights.

The fifth section of the practice act of 1851 does not extend to a case like the present, and the authorities cited from other states, being based on express statute, have no application.

Judgment affirmed, with costs.

HEYDENFELDT, J., concurred.

ASSIGNMENT OF CONTRACT IS, IN GENERAL, NOT BINDING UNTIL NOTICE thereof is given to the debtor: *Smith v. Ewer*, 60 Am. Dec. 73; *Gallagher v. Caldwell*, Id. 85; *Clodfelter v. Cox*, Id. 157, and the cases cited in the notes thereto.

VALIDITY OF ASSIGNMENT, WITHOUT NOTICE TO DEBTOR, AS AGAINST SUBSEQUENT ASSIGNEES or attaching creditors of the assignor: See *Muir v. Schenck*, 38 Am. Dec. 633, and note; *Van Buskirk v. Hartford Ins. Co.*, 36 Id. 473, and note reviewing the conflicting decisions; *Smith v. Blatchford*, 52 Id. 504; *Richards v. Griggs*, 51 Id. 240.

PETERS v. JAMESTOWN BRIDGE CO.

[5 CALIFORNIA, 334.]

MORTGAGE UNSATISFIED UPON RECORD IS SUBJECT OF SALE TO ALL INNOCENT PARTIES.

PURCHASER OF MORTGAGE CANNOT BE CHARGED WITH CONSTRUCTIVE NOTICE of anything subsequent to the mortgage except its assignment or satisfaction duly entered of record.

FREE-SIMPLE, WARRANTY DEED OF MORTGAGED PREMISES from mortgagor to a third person cannot operate as an assignment of the mortgage.

MORTGAGE IS MERE SECURITY FOR DEBT, and cannot pass without a transfer of the debt.

SUIT to enjoin the defendants from making a foreclosure sale of the premises in controversy. Perry sold to Thayer a tract of land and took a mortgage for the payment of the purchase money, which was duly recorded. Afterwards Perry conveyed by warranty deed all his right, title, and interest in the property to the plaintiff. After the recording of this deed Perry assigned the Thayer mortgage, which, after passing through several hands, came to the defendants as assignees. The defendants brought action against Thayer to foreclose the mortgage. They had obtained a decree, and were about to sell the property, when the plaintiff brought this suit to enjoin them from proceeding on the execution, on the ground that a sale would create a cloud upon his title. The court, upon these facts, decreed a perpetual injunction, whereupon the defendants appealed.

H. P. Barber, for the appellants.

E. F. Hunter, for the respondent.

By Court, HEYDENFELDT, J. The mortgage from Thayer to Perry was upon record, and operated as constructive notice to all persons. It was unsatisfied, and therefore it was the subject of sale to all innocent parties.

The purchaser of the mortgage cannot be charged with con-

structive notice of anything subsequent to the mortgage, except its assignment or satisfaction duly entered of record.

The deed from Perry to plaintiff could not operate as an assignment of the mortgage. The latter is a mere security for the debt, and cannot pass without a transfer of the debt; so it would seem that the two transactions are totally different in character: the intent of the one is to convey the title to land; of the other, to transfer a debt with its security. If a contrary doctrine was maintained, it would produce the evil (as in this case) of enabling a net to be thrown for the entrapment of the innocent. The law always must favor the principle that what is intended to be done must be done directly.

Two cases are cited by the respondent's counsel which seem to point to a different conclusion. I have examined them, and find them unsustained by authority or by the best reasoning: *Hunt v. Hunt*, 14 Pick. 374; *Freeman v. McGaw*, 15 Id. 82.

The result of our judgment is, that the decree must be reversed and the cause remanded.

MURRAY, C. J., and BRYAN, J., concurred.

MORTGAGE IS MERE SECURITY OF PAYMENT OF DEBT, AND TAKING MORTGAGE does not extinguish the debt nor suspend the remedy thereon: *Burke v. Cruger*, 58 Am. Dec. 102; see *Buck v. Swazey*, 56 Id. 681; *Godefroy v. Caldwell*, 1d. 360, and cases cited in the note; *Hall v. Savill*, 54 Id. 485; *Waring v. Smyth*, 47 Id. 299, and note citing prior cases. To the point that a mortgage is a mere security for the debt, the principal case is cited in *Payne v. Bensley*, 8 Cal. 267; *Willis v. Farley*, 24 Id. 498; the latter case holding that when the debt is barred the remedy on the mortgage is barred.

ASSIGNMENT OF MORTGAGE DEBT CARRIES MORTGAGE SECURITY WITH IT: *Buck v. Swazey*, 56 Am. Dec. 681; *Roberts v. Halstead*, 49 Id. 541, and note 544, collecting prior cases; *Stewart v. Preston*, 44 Id. 621.

ASSIGNMENT OF MORTGAGE WITHOUT DEBT IS MERE NULLITY. The principal case is cited to this effect in *Ladue v. Detroit etc. R. R. Co.*, 13 Mich. 396. See *Wilson v. Troup*, 14 Am. Dec. 458.

DEED OF QUITCLAIM AND RELEASE conveyed mortgagee's estate in *Hunt v. Hunt*, 25 Am. Dec. 400; but there the legal title was in the mortgagee.

MAY v. HANSON.

[5 CALIFORNIA, 260.]

FERRY-MEN ARE COMMON CARRIERS.

FERRY-MAN BECOMES LIABLE FOR PASSENGER'S SAFE TRANSIT AND DELIVERY

AS SOON AS HE SIGNIFIES HIS ASSENT OR READINESS TO RECEIVE THE PASSENGER, and is chargeable with any accident occurring except by act of God or the public enemy.

FERRY-MAN MUST SEE THAT TEAMS ARE SAFELY DRIVEN OFF FROM AS WELL AS UPON HIS BOAT. He may drive himself, or may unharness the team, or unload them, for the purpose of getting them safely on board.

FERRY-MAN PERMITTING PARTY TO DRIVE HIS OWN TEAM OFF FROM OR UPON HIS BOAT constitutes him *quoad hoc* his agent, and is responsible for all accidents.

PLAINTIFF NEED NOT PROVE HIS OWN ORDINARY CARE TO AVOID INJURY, in an action against a ferry-man for injuries received in driving off from his boat, but proof of plaintiff's want of ordinary care lies on the defendant.

IT IS DISCRETIONARY WITH COURT TO ALLOW PLAINTIFF TO INTRODUCE EVIDENCE after motion for nonsuit.

IT IS NOT ERONEOUS FOR COURT TO OFFER TERMS TO DEFENDANT.

ALLEGATION ON MOTION FOR NEW TRIAL, THAT PARTY WAS TAKEN BY SURPRISE, is not supported by the record when there is no affidavit of the fact, and nothing to show that he had employed due diligence to obtain evidence.

ACTION for damages for injuries received in crossing the defendant's ferry. The injury to the plaintiff happened while he himself was driving his wagon off from the ferry-boat at the end of the trip. The third instruction requested by defendant's counsel was "that the plaintiff must show to the satisfaction of the jury that the action and injury of which he complains were caused by the negligence, fault, or default of the defendant, in which he, the plaintiff, had no agency, and did not in any manner contribute, and if he has failed by proof so to have shown, then they must find for the defendant." This instruction was refused. Regarding defects in the plaintiff's wagon, the court charged: "The defendant further urges that the accident was the result of intrinsic defects in the wagon of the plaintiff; and that the injuries resulted from said defects, and not from any defects in the landing. If you think that the evidence in the case supports this position, then the plaintiff cannot recover; but if you believe that the plaintiff's wagon would have carried the load which was on it and himself over an ordinary road with safety and without injury, and that the condition of the defendant's landing occasioned the accident, and that the same, by a reasonable effort and expense on the part of the defendant, could have been improved and the accident prevented, then the defendant is liable for the damages resulting therefrom." To this instruction, and to others embodying the principles laid down in the opinion, the defendant excepted. The jury awarded the plaintiff eight thousand three hundred dollars damages. The defendant moved for a new trial. The motion was overruled, and the defendant appealed.

G. N. Sweeney and Z. Montgomery, and L. Sanders, for the appellant.

Charles Lindley, for the respondent.

By Court, MURRAY, C. J. The law regards ferry-men as common carriers, and has imposed upon them the same duties and liabilities: *Miles v. Johnson*, 1 McCord, 157; *Cohen v. Hume*, Id. 439; *Rutherford v. McGowen*, 1 Nott & M. 17; *Fisher v. Clisbee*, 12 Ill. 344, and the cases there cited.

The principle deduced from these authorities is that as soon as the ferry-man signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery, and is chargeable with any accident occurring, except by act of God or the public enemy.

In two of the cases just cited the accident occurred in driving into the flat or boat, and in both cases it was held to be the duty of the ferry-man to see that the teams were safely driven on board of the boat. If, says the court, in those cases the ferry-man thinks proper, he may drive himself, or may unharness the team, or unload them, for the purpose of getting them safely on board. But if he permits the party to drive himself, he constitutes him *quoad hoc* his agent, and is responsible for all accidents.

There can be no reason why this rule should not apply to the delivery as well as to the receipt of goods or passengers. A ferry-man undertakes to safely transport passengers or freight from and to certain points, and from the moment that he receives until he has delivered his freight in a proper and safe manner he will be liable. It is his duty to provide suitable boats, and all the conveniences necessary for transportation.

By the sixteenth section of the act regulating public ferries, it is made the duty of all ferry-keepers within this state to cause the banks of the river or creek to be dug sufficiently low, and kept in good passable order for the passage of man and horse, wagons, and other vehicles.

The duty and liability of the defendant being thus stated, it only remains to ascertain whether the present case comes within the rule laid down.

It appears from the evidence that the accident occurred by the breaking of the wagon, occasioned by a sudden pitch of the wheels from the apron of the boat upon some rough logs, which were laid down as a track or road leading from the boat to the bank. Whether the accident was occasioned by the careless-

ness of the ferry-man or driver, or on account of some latent defect in the wagon, was a question of fact, upon which there was conflicting testimony, which was submitted to the jury.

The law of the case was correctly stated in the instructions of the court below, and the defendant's instructions were properly refused. Much stress was laid in the argument upon the refusal of the court to give the third instruction asked for by the defendant. The instruction does not embody the true rule of the law, but on the contrary, it is held that it is not incumbent on the plaintiff to prove the exercise by him of ordinary care to avoid the injury, but that the proof of want of it on the part of the plaintiff lies on the defendant; that he who avers a fact in excuse of his own misfeasance must prove it: *Beatty v. Gilmore*, 16 Pa. St. 463 [55 Am. Dec. 514].

There was no error in allowing the plaintiff to introduce the ferry license after motion of nonsuit; this was a matter within the discretion of the court below, as we have often held before. There was no error in the court in offering terms to the defendant. Such practice is frequent in every state, and often serves to quiet litigation.

The allegation that the defendant was taken by surprise is not supported by the record. There is no affidavit of the fact, and nothing to show that he had employed that diligence to obtain the testimony of his witnesses which the law requires.

We are satisfied that this case has been fairly tried; that the law has been correctly laid down; and although the verdict may seem large, we have no power to interfere with it.

Judgment affirmed, with costs.

HEYDENFELDT, J., concurred.

FERRY-MEN ARE COMMON CARRIERS: See note to *Chevallier v. Straham*, 47 Am. Dec. 653. The principal case is cited to this effect in *Griffith v. Case*, 22 Cal. 535; *Slimmer v. Merry*, 23 Iowa, 94.

WHEN EVIDENCE SHOWS THAT TEAMS HAVE DRIVEN ON BOARD BOAT, which has proceeded under the directions of the ferry-man a portion of the distance across the river when the accident occurs, this establishes that the ferry-man's liability as a common carrier has attached when the loss accrues. The principal case is cited upon this proposition in *Griffith v. Case*, 22 Cal. 535.

COMMON CARRIER'S LIABILITY FOR ACCIDENTS, EXCEPT ACT OF GOD OR PUBLIC ENEMY: See *Norway Plains Co. v. Boston & Maine R. R. Co.*, 61 Am. Dec. 423.

NEW TRIAL ON GROUND OF SURPRISE, DILIGENCE REQUIRED: See *Lisard v. Croesland*, 60 Am. Dec. 213; *Clark v. Carter*, 58 Id. 485; *Rogers v. Heis*, 54 Id. 300; *Riley v. City of Louisville*, 46 Id. 560; *Barnes v. Milne*, 24 Id. 422; *Ford v. Ford*, 12 Id. 587.

CONTRIBUTORY NEGLIGENCE, GENERAL PRINCIPLES OF LAW OF: See note to *Freer v. Cameron*, 55 Am. Dec. 666-678.

BURDEN OF PROVING PLAINTIFF'S CONTRIBUTORY NEGLIGENCE IS UPON DEFENDANT. The principal case is cited to this point in *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 255; *Sherf v. City of Huntington*, 16 W. Va. 317; see note to *Farish v. Reigle*, 62 Am. Dec. 666.

QUIGLEY v. GORHAM.

[5 CALIFORNIA, 418.]

WORDS OF STATUTE MUST BE INTERPRETED ACCORDING TO THEIR COMMON ACCEPTATION.

TERM "WAGON," IN EXEMPTION STATUTE, MEANS a common vehicle for the transportation of goods.

HACKNEY-COACH USED FOR CONVEYANCE OF PASSENGERS IS NOT "WAGON," within meaning of exemption statute.

APPEAL from the district court of the twelfth judicial district, San Francisco county. The opinion states the case.

Haights and Gary, for the appellant.

F. M. Pixley and John V. Wattson, for the respondent.

By Court, HEYDENFELDT, J. The words of a statute must be interpreted according to their common acceptance. In the act which exempts certain articles from execution, the term "wagon" is intended to mean a common vehicle for the transportation of goods, wares, and merchandise of all descriptions. A hackney-coach used for the conveyance of passengers is a different article, and does not come within the equity or literal meaning of the act.

Judgment reversed, and cause remanded.

MURRAY, C. J., concurred.

EXEMPTION STATUTES SHOULD BE LIBERALLY CONSTRUED: *Favers v. Glass*, 58 Am. Dec. 272; note to *Rockwell v. Hubbell's Adm'res*, 45 Id. 252.

"WAGON" AND "CART," HOW CONSTRUED IN EXEMPTION STATUTE: See *Favers v. Glass*, 58 Am. Dec. 272; note to *Rockwell v. Hubbell's Adm'res*, 45 Id. 255.

WORDS IN STATUTE SHOULD, IN GENERAL, BE CONSTRUED according to ordinary acceptance: *Favers v. Glass*, 58 Am. Dec. 272, wherein, however, a distinction is made in the case of exemption statutes. Common words in such cases, it is said, should receive a broader and more liberal interpretation in accordance with the manifest intention of the legislature. See also the note to *Rockwell v. Hubbell's Adm'res*, 45 Id. 252. For construction of words in statutes generally, see also *State v. Baltimore etc. R. R. Co.*, 38 Id. 317; *Buckner v. Real Estate Bank*, 41 Id. 105, and the cases cited in the notes.

"TOOLS," HOW CONSTRUED IN EXEMPTION STATUTE: See *Healy v. Bateson*, 60 Am. Dec. 94, and note 96.

HILL v. NEWMAN.

[5 CALIFORNIA, 445.]

RIGHT TO RUNNING WATER, IN CALIFORNIA, IS RIGHT RUNNING WITH LAND, a corporeal privilege bestowed upon the occupier or appropriator of the soil, and has none of the characteristics of mere personality.

RIGHT TO RUNNING WATER EXISTS, IN CALIFORNIA, FROM POLICY OF HER LAWS, without private ownership of the soil, upon the ground of prior location upon the land, or prior appropriation and use of the water.

JUSTICES OF PEACE HAVING JURISDICTION OVER INJURIES TO PERSONALITY ONLY have no jurisdiction to try cause for damages from diversion of water from a natural or artificial channel.

APPEAL from the county court of Placer county. The opinion states the case.

Hale and Myres, for the appellants.

Mills and Hillyer, for the respondent.

By Court, BRYAN, J. This was an action brought before a justice of the peace for damages arising from injuries alleged to have been inflicted by the defendants upon the plaintiff, by the partial destruction of mining ditches belonging to the plaintiff, and the wrongful diversion of water into ditches belonging to the defendants. The only question which seems to be raised by the record is whether a justice of the peace has jurisdiction of such a cause, where the injury is to other than personal property.

The jurisdiction of justices of the peace in this state embraces actions for damages for taking, detaining, and injuring personal property; and actions for the recovery of personal property where the value of the property does not exceed the limit to which the court is confined in the exercise of its jurisdiction. Where there is a right to the use of water for mining purposes, and the appropriation of it, a diversion of the stream could not be called an injury to personal property in the meaning of the law. It seems to me clear that whilst the legislature has conferred upon justices of the peace jurisdiction of an action to determine the right to mining claims, yet that it never was its intention to confer upon those courts power to hear and determine causes in which there may be conflicts as to the right to the use of water.

The right to running water is defined to be a corporeal right or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes: *Sacket v. Wheaton*, 17 Pick. 105; 1 Cru. Dig. 39; Angell & Ames on Watercourses, 3.

From the policy of our laws, it has been held in this state to exist without private ownership of the soil, upon the ground of prior location upon the land, or prior appropriation and use of the water. The right to water must be treated in this state as it has always been treated as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such has none of the characteristics of mere personality. It therefore follows that a justice of the peace has no power conferred upon him to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted.

The judgment of the court below is therefore reversed with costs, and the cause is dismissed.

HEYDENFELDT, J., concurred.

PRIOR APPROPRIATION OF WATER IN RUNNING STREAM: See *Tharber v. Martin*, 61 Am. Dec. 488, and note citing prior cases. See also *Stein v. Burden*, 60 Id. 453; *Eddy v. Simpson*, 58 Id. 408.

PRIORITY OF APPROPRIATION DETERMINES RIGHT TO RUNNING WATER AND RIGHT TO MINE ON PUBLIC LANDS IN CALIFORNIA: See *Irwin v. Phillips*, *ante*, p. 113; and see *Stiles v. Laird*, *ante*, p. 110; and note to *McClinock v. Bryden*, *ante*, p. 91.

OLENDORF v. SWARTZ.

[5 CALIFORNIA, 480.]

INDORSER IS NOT INDEMNIFIED, SO AS TO RENDER HIM LIABLE WITHOUT DEMAND AND NOTICE, when the mortgage taken by him to secure the ultimate payment of the note is assigned by him at the time he indorses the note.

DECLARATION BY INDORSER TO THIRD PERSON NOT INTERESTED IN SUBJECT-MATTER is not a sufficient waiver of presentment and notice to fix the liability of the indorser.

APPEAL from the district court of the ninth judicial district, Shasta county. The opinion states the case.

R. T. Sprague, for the appellant.

Robinson and Beatty, for the respondent.

By Court, TERRY, J. This cause was tried by the court without the intervention of a jury, and judgment rendered in favor of plaintiff. It is stipulated that the finding of the facts by the court shall constitute the statement on appeal.

From this finding it appears that defendant, being the holder of two promissory notes, secured by mortgages, indorsed said

notes, and assigned said mortgages before maturity, and for a full consideration, to one Palmer, since deceased, of whom plaintiff is executor. It does not appear that the notes were presented to the payee at maturity, and notice of demand and non-payment given to defendant.

Defendant, in conversation with a third party, after the maturity of the notes, said that "the fact of notice not having been given at a proper time would make no difference with him; that he would do what was right." Upon these facts the court below decided that "no presentment and notice of non-payment was necessary in order to bind defendant; he, having taken security in advance, is liable as principal."

This conclusion of law, from the facts found, is clearly erroneous. The mortgages were taken to secure the ultimate payment of the notes, were assigned by defendant at the time of indorsing them, and were beyond his control. They were evidently not intended to indemnify defendant against his liability as indorser, and could have no such effect.

But it is contended by counsel for plaintiff that although the court below may have erred in the view taken of the point on which the decision was predicated, the declaration of defendant, that "he would do what is right," is sufficient of itself to sustain the judgment, and consequently it should be affirmed.

I do not think this declaration addressed to a third party not interested in the subject-matter a sufficient waiver of presentment and notice to fix the liability of the indorser in this case.

Judgment reversed with costs, and cause remanded.

MURRAY, C. J., and HEYDENFELDT, J., concurred.

WAIVER BY INDORSER OF DEMAND AND NOTICE BY PROMISE TO PAY: See *Lary v. Young*, 58 Am. Dec. 332; *Marshall v. Mitchell*, Id. 697, and notes citing prior cases.

WAIVER BY INDORSER OF DEMAND AND NOTICE BY TAKING SECURITY: See *Wardell v. Marshall*, 58 Am. Dec. 697, and note 699.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

ELMORE v. NAUGATUCK R. R. Co.

[23 CONNECTICUT, 457.]

RAILROAD COMPANY DOES NOT, BY MERELY RECEIVING GOODS MARKED TO GO TO PLACE beyond its terminus, undertake to carry them beyond the line of its own road. Neither an advertisement published by the company, setting forth the facilities for transportation possessed by the company, nor a receipt given by it to the shipper, stating that it has received the goods for transportation, is evidence of a special contract to carry the goods to the place to which they are directed; such receipt proves nothing more than a promise to carry the goods to the end of the road and thence forward them by the usual conveyance.

Action against defendants, as common carriers, brought to recover the value of certain bales of leather. The opinion states the facts.

*Seymour and Woodruff, and J. H. Hubbard, for the defendants.
Buel, and Hollister and Beman, for the plaintiff.*

By Court, ELLSWORTH, J. This is an action against the defendants, as common carriers, by a certain railroad, which has its northern terminus at Winsted and its southern at Bridgeport. It appears that at Wolcottville, which is on the line of the road, on the twenty-fifth day of July, 1852, the defendants received from the plaintiff seven bales of leather, marked for New York, part of it to Rich & Loutrel and a part to Cook & Mann. No money was paid or agreed to be paid for carrying the leather to any specific place, and nothing was said by either of the parties as to what was expected of the defendants, beyond what is implied from a receipt that the defendants received the bales for "transportation," and which described them by the

marks already mentioned. It is found, and not denied, that the bales were carried to Bridgeport, the southern terminus of the defendants' road, and there delivered to the steamer Alice, a boat in all respects suitable and proper for transporting freight between that place and New York; nor is any claim made that the defendants did not perform all they undertook to perform, in a proper and unexceptionable manner, and so were not liable after the bales were delivered to the steamer, unless it was their duty to carry them themselves or see them carried to New York; and further, there was no evidence or claim that there was any connection in business between the defendants and the steamer, except that in the customary way of forwarding freight they delivered goods to each other from time to time as they were marked for transportation, no matter to what place, whether New York, California, Europe, or Asia.

The leather was burned on board the steamer, with the boat itself, in the harbor of Bridgeport, on the night of the twenty-fifth of July, 1852, and it is to recover this loss the plaintiff has sued and recovered the full value of the leather.

To this verdict and judgment the defendants make several objections: 1. That the verdict is against evidence and should not be permitted to stand. A majority of the court think that this claim is well founded and must prevail. We believe that the jury adopted some false principle in their deliberations, or were prejudiced, or were influenced by improper considerations, however honest or unconscious they might have been. While we are ever reluctant to disturb a verdict because we may happen to differ from the jury upon matters of fact, or should ourselves have different inferences from the evidence, yet the case may be so palpable and glaring as to require us to do it, and especially where we see that they must have acted under erroneous views of the law. Now, taking all the evidence of the plaintiff together, all from which he claimed to have proved that the defendants had agreed to carry the goods to New York, and not merely to Bridgeport, the force of it is very weak indeed, and is most inadequate, in our view, to uphold this verdict. Besides, it must be remembered that under the charge of the court the jury must have found, and professedly did find, that there was a contract to carry by railroad to New York, which, as we shall hereafter show, is not only without evidence, but against all the evidence. It is important in the outset to bear in mind that the defendants were created and known as the Naugatuck Railroad Company, having a charter for a railroad through the valley

of the Naugatuck, and were in fact well known to the plaintiff, and equally so to the public, to be chartered for a railroad terminating southerly at Milford or Bridgeport. Nor is it pretended that in fact they were or ever have been common carriers, otherwise than over their own road. It is said they might have been carriers beyond, under a certain general clause in their charter, and therefore they might hold themselves out and agree to become carriers beyond Bridgeport, which, however, the defendants deny, and of which we will say more hereafter; but the great fact is not denied that the terminus of the defendants' road is, on the south, at Bridgeport, which is enough, in our judgment, to create a *prima facie* case that the defendants are to carry their freight to Bridgeport, and thence to forward it according to the course of business, which throws the burden of proof on the plaintiff, if he claims there was a special contract different from what the law implies. What is there, now, in this case to prove that there was such a special contract as the plaintiff claims? The plaintiff relies on three circumstances: the bales being consigned to New York, the receipt given to transport, and the advertisement published in two newspapers. Let us examine these circumstances; and we are more willing to do this because, if we do not mistake, there is a most important principle of law involved in the case—a principle of great practical importance to commercial men and to persons who are acting as carriers by land or by water. At this day vast amounts of property are constantly in the course of transportation from place to place within the country, and often beyond it; and it is not to be endured that there should be uncertainty as to the law where the duty of one carrier ends and that of another begins.

It is obvious that wherever the different carriers throughout the route are connected in the business of transportation by some joint undertaking or partnership, there can be no difficulty in case of a loss which happens on any part of the line; but the question arises, Where this is not the case, what is the law then? and what is it where the charters of railroad companies or steamboat companies are limited and defined in the character or mode of their business and the area and distance within which they may carry it on? Is the first carrier to be held to be the principal carrier, and all the others his agents and servants? or are they severally to be held to be principals, each answerable for losses on his own part of the route, and not otherwise?

To return, then, to the three circumstances mentioned. Does the ultimate destination of freight left at a depot for transportation prove a special promise by the carrier that that company will themselves carry it, or be responsible that it shall be carried to any consignee whose name is on it, as it may be, to a person in Oregon, or in the mountains of Thibet? We emphatically ask Could the defendants have refused to transport these bales as far as their road extends, although they were marked to go to a place beyond it? We think not. And if so, is it not obvious that the mere receiving them to transport is no evidence that they undertake to carry them beyond the line of their road? And does the receipt add anything to the proof? We think not. It is a mere admission of the fact that the bales have been received, and is evidence for the plaintiff, which he will possess, of the purpose for which they were received, viz., to be transported, not to be sold or consumed or otherwise appropriated. But this does not touch the question of distance or duty beyond the defendants' road. The writing is just as consistent with the defendants' claim as the plaintiff's, and hence cannot be *prima facie* evidence of anything beyond the fact that the bales were received to be forwarded; and the receipt proves nothing more than what the law would imply from the reception alone, viz., a promise to carry them to Bridgeport, the end of their road, and thence forward them by the usual conveyance, if not otherwise directed.

Since the argument, 1 Gray has come to hand, in which we find the case of *Nutting v. Connecticut R. R. Co.*, page 502, where the court decide that a railroad corporation receiving goods for transportation to a place situated beyond the line of their road, or on another railroad which connects with theirs, but with the proprietors of which they have no connection in business, and taking pay for the transportation over their own road only, are not liable, in the absence of any special contract, for the loss of the goods after their delivery to the proprietors of the other railroad. The language of the receipt in that case is much stronger than it is here; it is not merely to transport, but to "transport to New York." The court say: "The obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers to be forwarded towards their ultimate destination." "If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability. If they are liable in this case, we do not see why they would not

be liable if the boxes had been marked for consignees in Chicago, and had been lost between that place and Detroit on a road with which they have no more connection than they have with any railway in Europe." It was further claimed in that case that the receipt proved a special contract to carry to the place of destination; but the court say: "We cannot so construe the receipt; it merely states the fact that the boxes had been received for transportation to New York, and the plaintiff might have proved that fact, with the same legal consequences to the defendants, by oral testimony, if he had not taken a receipt. That receipt, in our opinion, imposed on the defendants no further obligation than the law imposed without it."

In the late case of *Hood v. New York & N. H. R. R. Co.*, 23 Conn. 609, which has been twice before this court, we had occasion to express our views upon contracts raised by implication against such corporate companies from their receiving passengers going to places beyond the terminus of their road; and we then granted a new trial for a verdict against evidence which was, in our judgment, very much stronger against the railroad company than is the evidence in the present case; and we further intimated that the recent English cases which were then urged upon us, as they have been at this time, were not law, unless there is a distinction between an implied contract to carry freight and a contract to carry passengers. We rejected the law of those cases in their application to passengers, and we are ready to do it in relation to freight. We cannot think that a railroad taking goods and nothing more to transport proves a promise to carry them to any place to which they are consigned, either in or out of the country, and this, too, whether there be public or private conveyances or not, to the places designated. If those cases can be placed on circumstances peculiar to the modes of conducting business in England, they may, in that way, be reconcilable with the practices and understanding of men of business, but otherwise they seem to us altogether unreasonable and severe. The same view of those cases is expressed by the court in Massachusetts, in the case already referred to, where, after commenting on them with dissent, they make reference to the case of *Hood v. New York & N. H. R. R. Co.*, *supra*, as containing the correct law. They use this language on page 505: "The plaintiff's counsel relied on the case of *Muschamp v. L. & P. J. Railway*, 8 Mee. & W. 421, in which it was decided by the court of exchequer that where a railway company take into their care a parcel directed to a particular place,

and do not by positive agreement limit their responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that place be beyond the limits within which the company in general profess to carry on their business as carriers:" *Watson v. A. N. & B. Railway*, 3 Eng. L. & Eq. 497. We cannot say the court in Massachusetts concur in that view of the law, and we are sustained in our dissent from it by the court of errors in New York, and by the supreme courts of Vermont and Connecticut: *Van Santvoord v. St. John*, 6 Hill, 157; *Farmers' & Mechanics' Bank v. Champlain Transportation Co.*, 18 Vt. 140 [42 Am. Dec. 491]; S. C., 23 Vt. 209 [56 Am. Dec. 68]; *Hood v. New York & N. H. R. R. Co.*, 22 Conn. 1.

Besides the evidence commented on, there remains only the defendants' advertisement, which was published in two newspapers. This notice, when justly considered, in our judgment furnishes but little, if any, evidence of a special contract to transport, beyond what the law itself implies. It gives notice how all freight received on the defendants' road will be arranged and classified in the defendants' way-bill, and generally that the facilities for transporting freight are greatly improved, and may be considered certain. Circumstances of a like character, only much stronger, were pressed upon us in the case of *Hood v. New York & N. H. R. R. Co.*, *supra*; but they were there held to be equivocal and indecisive, and we did then, as we do now, attach but little importance to such general testimony, especially when, if all other evidence in the case is taken into consideration, such general testimony is fully explained.

Again: under the charge of the court it was necessary for the jury to find that the defendants undertook, not only to carry the leather to New York, but to carry it there by railroad. The judge instructed them that this court, in a recent case, had decided that a railroad company had not power to transport, otherwise than by railroad, and hence that the directors, or agents in the present case, could not make a promise to carry by steamers; that such a promise would not bind the company, and hence if they found the promise was to carry the plaintiff's goods by steamers, the defendants were not liable to the plaintiff, and the verdict must be for the defendants. Now, under these instructions, we are at a loss to discover any serious question, for if the comments already made on the plaintiff's evidence are correct, there was absolutely no serious evidence of a promise at all to carry by railroad to New York, but the proof

was clearly to the contrary, and when all of it is taken together, it is quite obvious that the belief and understanding and positive agreement between the parties was that the plaintiff's goods were not to go by railroad, but by steamers. H. B. Richards, agent of the defendants at their depot in Wolcottville, testifies that about a year before these goods were lost Elisha S. Elmore, brother and agent of the plaintiff, ordered the witness "to send all their goods to Bridgeport, and thence by steamboat to New York;" and he testifies further that said Elisha inquired of him which way would be the cheapest, and the witness informed him that the cheapest way was the steamboat, and then said Elisha gave the directions already stated. This testimony is not, we think, impaired or impeached. The witness further testifies that a few days after said directions he saw the plaintiff himself, and told him the defendants were sending his goods, by his brother's orders, by the boat, and that the plaintiff replied, "It is all right." This is not seriously contradicted, except by a kind of negative evidence of the plaintiff himself. The witness further testifies that a handbill, in the words following: "Notice to shippers. To avoid errors in the transhipment of freight to New York, all freight destined to that place will be sent hereafter by steamers, unless marked by railroad to New York. Bridgeport, April 1, 1852. Philo Hurd, supt.," was posted up on the twelfth of the same month, in a conspicuous place in the depot at Wolcottville, and also that he sent a copy to each of the principal shippers, and he believes to the plaintiff; that since the sixteenth of June, 1852, the company had conformed to said notice, and constantly sent freight by the steamer; that the plaintiff never gave different orders, and was constantly receiving his freight sent from New York by the steamer, and saved thereby one cent freight on a hundred pounds. So A. N. Dennis testifies that the plaintiff said he had directed the defendants to send his goods by the cheapest way. So we think it is fairly inferable from the testimony of Clark N. Dow that the plaintiff had seen the handbill before the leather was shipped. But let this be as it may, proof of knowledge is not a prerequisite; for although a notice by a common carrier that he will hold himself responsible only under certain limitations may not avail him without evidence of a mutual agreement to that effect, the law is otherwise when the question is the capacity in which and purpose for which goods are received. So, too, the shippers are supposed to know and to assent to the general customs and mode of business pursued by those they employ; and the defendants'

evidence on the custom is complete. Upon the whole, we are quite satisfied that the verdict is manifestly against evidence, and that for this reason there must be a new trial.

The defendants further insist that the court erred in instructing the jury that the delivery of the goods to the defendants for transportation, and their giving a receipt to that effect, was *prima facie* evidence of an undertaking to carry the goods to New York, that being the place of their ultimate destination. We have already expressed the views of a majority of the court on this point, and will not recapitulate. Were the English cases cited held to be good law in this state, we should not differ from our learned brethren; but we conceive that they are not law, either in this or any of the states in the Union; certainly they are not in the states mentioned, and we know not that they are in any of them.

Another question decided below, which has been somewhat argued here, but not as the chief point, as the defendants were confident they must have a new trial on other and obvious grounds, has been mentioned: we mean the incapacity of the defendants to become common carriers beyond the line of their own road, and if they cannot be, then the supposed promise to become such is without their charter and void, as to the company certainly, however it may be as to the directors and agent who made the promise. The power of the company in the defendants' views is supposed to be derived from that clause of the charter which is to be found near the end of the first section in these words: "With permission also to make any lawful contract with any other railroad corporation in relation to the business of said company." The judge decided that under this clause the defendants could become common carriers to New York, and could undertake to become such whether in fact they had taken the necessary steps for it or not. If this is so, then the defendants insist that, by analogy, the agents of the company can make the company carriers to any and every other part of the country wherever the directors can take a lease of a railroad, or stipulate with the directors of it that they will run the road on their account, or at least in part, in behalf of the defendants' freight and passengers. On the other hand, the defendants insist that this is not the true construction and intention of this clause, and judging from its position and connections in the charter, it is meant to give a liberty which is incidental only to the exercise of other specific powers of the charter as a limited one, restricting the company to the Naugatuck valley, with outlets and ter-

mini at New Haven, Milford, or Bridgeport; that the legislature meant only to authorize them to unite with the New York & New Haven Railroad Company, or any other company, in a common depot building, or the use of their road and cars, or the running of the defendants' cars on their road, or the like, within the limits of the defendants' road; for else the defendants will not be a company under a limited and defined charter, or within located limits; but a sort of express company, with power to extend their business throughout the country. We state the question, and in a brief form the claims of counsel as we understand them; but as our decision is placed on other grounds, we do not dwell on them, and do not mean to be understood as expressing any opinion.

We advise a new trial.

WAITE, C. J., delivered a dissenting opinion.

WHEN SEVERAL CARRIERS UNITE TO COMPLETE LINE of transportation, and receive goods for one freight, they are each liable for damages for loss of or injury to them, subject to reclamation against the party by whose act the damage occurred: *Hart v. Rensselaer & S. R. R. Co.*, 59 Am. Dec. 447, note 450, where other cases are collected.

RAILROAD COMPANY CAN MAKE VALID CONTRACT TO CARRY FREIGHT beyond the limits of its own road: See note to *Hart v. Rensselaer & S. R. R. Co.*, 59 Am. Dec. 450, and the cases there cited.

THE PRINCIPAL CASE IS CITED in *Converse v. Norwich & N. Y. T. Co.*, 33 Conn. 179, to the point that the mere receipt of goods marked for and destined to a place beyond the terminus of a carrier's route is not *prima facie* evidence of a contract to carry to the place of destination. In *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 Id. 483, Hinman, J., said he felt bound to yield to the opinion of the court in *Hood v. New York & N. H. R. R. Co.*, 22 Id. 502, and in the principal case, and on the authority of those cases he did not dissent, although but for those cases he should have felt bound to dissent.

HARRISON v. WYSE.

[24 CONNECTICUT, 1.]

MORTGAGOR SUFFERED TO REMAIN IN POSSESSION OF MORTGAGED PREMISES is not accountable to any one for the rents and profits thereof.

MORTGAGEE WHO TAKES POSSESSION AND RECEIVES RENTS AND PROFITS of the mortgaged premises becomes accountable for them, and is bound to apply the net proceeds in reduction of his debt.

WHEN SECOND MORTGAGEE APPLIES TO REDEEM PRIOR MORTGAGE, he stands in the same situation as the mortgagor, and is entitled to the benefit of all payments made by him, and of all rents received by the prior mortgagee, and is not bound to pay any greater sum than the mortgagee would have had to pay if the application had been made by him.

MERE PURCHASE OF EQUITY OF REDEMPTION BY PRIOR MORTGAGOR in possession, receiving the rents and profits of the mortgaged premises, does not, so far as the subsequent mortgagee is concerned, change the position of such prior mortgagee, or his accountability for the rents and profits received after the purchase, but he is considered as continuing in possession in the same manner as when his occupancy commenced.

BILL in chancery, brought by the plaintiff as the assignee of a mortgage against the defendants as holders of prior mortgages and the equity of redemption, praying for a decree allowing the plaintiff to redeem the prior mortgages, and foreclosing the defendants of their right of redemption. The question how far the rents and profits received by the defendants were to be applied in part payment of their debts was reserved for the advice of this court. The other facts are stated in the opinion.

Tyler and Whittlesey, for the plaintiff.

Palmer and Spencer, for the defendants.

By Court, WAITE, C. J. The principles relating to the accountability for the rents and profits of mortgaged premises are well settled. The only difficulty in the present case is as to their application. If the mortgagor is suffered to remain in possession, he is not accountable for them to any one. He is considered in equity as the owner of the property, and the mortgagee as having but a lien for the security of his debt. If the latter wishes to appropriate them to his own use, he must in the first place obtain the possession of the property. Until that is done, he has no claim to the income.

On the other hand, if the mortgagee takes possession and receives the rents and profits, he becomes accountable for them, and is bound to apply the net proceeds in reduction of his debt. As soon as they are received, equity makes the application, and they have the same effect as any payment made by the mortgagor.

When the latter applies to redeem, he is required to pay no more than the balance of his debt remaining due after the application of all payments made by him, and the net proceeds of all rents and profit received by the mortgagee while in possession.

Whenever a second mortgagee applies to redeem a prior mortgage, he stands in the same situation as the mortgagor; is entitled to the benefit of all payments made by him, and all rents received by the prior mortgagee, and is bound to pay no greater sum than the mortgagor would upon an application made by him.

In this case the defendants held the prior mortgages, and under them entered and took possession of the premises, and thereupon became accountable for the rents and profits in any suit brought either by the mortgagor or the subsequent mortgagee for the redemption of their mortgages. And this is admitted by their counsel, at least so far as the mortgagor is concerned.

But after they had thus taken possession, they purchased the equity of redemption, and thus in equity became the owners of the whole property, subject only to the mortgage now held by the plaintiff. They now claim that from the time of such purchase they stand in the situation of the mortgagor, and became no longer accountable for the rents and profits.

This question becomes important only in one event. The defendants, upon the present application, are put to their election, either to pay the plaintiff's debt, and take the property to themselves, or submit to be foreclosed of their equity of redemption, and permit the plaintiff to take the property upon payment of their debts secured by the prior mortgages.

In the former case, it is perfectly immaterial whether they received the rents as mortgagees or as assignees of the equity of redemption. In either case they take the property upon the payment of the plaintiff's debt.

But on the other hand, if they elect to be foreclosed of their right to redeem, and permit the plaintiffs to redeem their mortgages and take the property, the inquiry becomes material, for the purpose of determining the amount which the plaintiff is required to pay, or in other words, the amount of their debts remaining unsatisfied.

As the defendants entered into possession of the property in their character of mortgagees, received the rents and profits as such, and thereby became bound to apply them in part satisfaction of their debts, we are inclined to think that, so far as the plaintiff is concerned, they have not changed their position or accountability by the mere act of purchasing the equity of redemption, but are to be considered as continuing in possession, in the same manner as when their occupancy commenced, and of course as accountable for all the rents and profits by them received. Our advice therefore is, that the decree be made in conformity with the opinion here expressed.

In this opinion STORRS and HINMAN, JJ., concurred.

Decree accordingly.

LIABILITY OF MORTGAGEE IN POSSESSION FOR RENTS AND PROFITS: See *Benham v. Rowe*, 56 Am. Dec. 342, note 347, where other cases are collected.

WHEN MORTGAGOR MAY BE DECREED TO PAY RENTS AND PROFITS TO THE MORTGAGEE: See *Bank of Utica v. Finch*, 49 Am. Dec. 175.

RIGHTS OF SUBSEQUENT MORTGAGEES: See *Saunders v. Frost*, 16 Am. Dec. 394.

THAMES STEAMBOAT CO. v. HOUSATONIC R. R. CO.

[24 CONNECTICUT, 40.]

PRINCIPLE WHICH MAKES MASTER LIABLE FOR TORTIOUS ACT OF SERVANT done in the performance of the master's business, within the scope of the general authority conferred, is the same as that which makes him liable for the act of his servant done by his express direction given at the time; but the remedy in the former case is by an action on the case founded upon the negligence of the servant, while in the latter case the remedy is by an action of trespass founded, not upon the relationship of master and servant existing between them, but upon the fact that the act was done by his express direction and command, and is therefore in reality as well as in law his own act.

PERSON CANNOT BE MADE TRESPASSER AGAINST HIS WILL, but he may be made liable in an action on the case for the negligence of his servant, though such negligence be contrary to his wishes.

MASTER IS NOT LIABLE IN TRESPASS FOR TORTIOUS ACT OF HIS SERVANT unless such act was by him ordered, directed, or authorized to be done, or is the natural or necessary consequence of something ordered to be done.

WHERE SERVANT EMPLOYED TO WATCH BUILDING OF TRIFLING VALUE, on a wharf, unnecessarily cuts adrift from the wharf a valuable steamboat, on discovering that she is on fire, and the vessel floats out of reach and is burned, the master is not liable in an action of trespass for her destruction, in the absence of any proof that such watchman was ordered or directed by him to cut the vessel's cables.

TRESPASS *vi et armis*. The opinion states the case.

Foster, Wait, and E. Perkins, for the plaintiffs.

Hawley and McCurdy, for the defendants.

By Court, HINMAN, J. The plaintiffs in this case having closed their evidence, the defendants moved for judgment as in case of nonsuit; and the superior court, being of opinion that the plaintiffs had failed to make out a *prima facie* case, granted the motion; and the case is now brought before us for revision, under section 2 of the statute of 1852, Comp. Stats. 1854, p. 97. The question here is the same as in the superior court. Is the plaintiffs' evidence sufficient, in point of law, to make out a *prima facie* case in their favor?

From the evidence, it appears that the plaintiffs' steamboat called the *Alice*, in July, 1852, was moored alongside of the defendants' wharf in Bridgeport, upon which the defendants had what the witnesses call a depot, or freight-shed, an old wooden shed, described as similar to a farmer's corn-house. The boat was fastened to the wharf by means of cables, and on the night of the twenty-first of July the boat took fire, between the wheel-houses, near the smoke-pipe, and before the fire had so far progressed as to endanger the building upon the wharf, and while she was in such a condition that the witnesses supposed the fire could easily be extinguished by the engines just then arrived, or arriving, at the spot, she was cut loose from the wharf by the defendants' watchman, Lawrence Sheridan, and drifted out upon the flats, and was consumed and destroyed. After the boat had drifted away from the wharf, Capt. Hawley, also in the defendants' employment, as superintendent, on hearing it proposed to haul her alongside of the wharf again, said that she could not be hauled back again.

The action is trespass *vi et armis*, for causing, by means of the defendants' servants, the cables, by which the boat was fastened to the wharf, to be cut; by means of which the boat drifted away from the wharf, and thereby prevented the plaintiffs' servants from extinguishing the fire, and thus saving the boat. It does not appear what Sheridan's duty as watchman was. Nor does it appear that the defendants had any property to be watched at the place, except the wooden shed, which was upon their wharf. It is insisted, however, by the plaintiffs, that as watchman he had an unlimited discretion to do everything that he might think necessary, in order to secure the plaintiffs' property from injury, in any emergency like the one in question; and that as he exercised this discretion in an unreasonable manner, by cutting the boat loose when there was a reasonable probability that she might have been saved, and especially when there was no reasonable ground to apprehend danger to the defendants' property from her burning at the wharf, the wind at the time being in a direction to drive the fire from the wharf and the building that was upon it, the defendants are liable, and in this form of action, for his acts.

The view which we have taken of the case renders it unnecessary for us to determine the extent of the watchman's discretionary power, and we therefore do not wish to be considered as expressing any opinion upon it, any further than it is involved in the question which we do feel called upon to decide.

in order to determine whether there was any error in the court's granting the nonsuit. To hold, however, that his discretion was unlimited, as claimed by the plaintiffs; that he had power to do whatever he might think best, even to the destruction of the property of third persons, and without any reference to its comparative value to the property he was set to watch, is such a startling proposition that we cannot for a moment sanction it.

If such a proposition could be sustained, then, indeed, the defendants might be liable in trespass for this injury, because to employ an agent with such unlimited powers might be tantamount to an express direction to the watchman to cut the boat loose, given at or before the time when the act was done. The question, it is to be observed, is confined to the powers the law will imply, or infer to have been given to this agent, because there was no proof of any other powers having been given him in point of fact. The books tell us that general agents must exercise a sound discretion, but precisely what this consists in they do not inform us. It appears to us that it is more correct to say that the law will imply, in favor of agents, whether the agency is limited to one or more objects, the usual and appropriate means to accomplish the object or objects of the agency. There must be some discretionary power in every agency, where the manner in which it is to be conducted is not specifically pointed out by precise and definite instructions, given before it commences, or has not become settled by known rules of law; and wherever there is any discretionary power, whether it is general or limited in its nature, it would seem that it ought to be exercised soundly. An unlimited discretion would give the watchman power to pull down or blow up, with any means at his command, any buildings contiguous to a fire which he might think to some extent endangered the property he was set to watch. If such powers were in fact given to a watchman, we do not see why the master should not be liable for its exercise. But a power so liable to be abused, and when abused attended with such consequences, no prudent man would intrust to an agent of this description. And will the law, by implication, confer a power which no prudent man would intrust to his agent? All powers are to be construed with reference to the subject-matter, which, in this instance, was to keep watch. As incident to the discharge of this duty, the watchman might have power to extinguish fires, and, in some instances, to remove combustible materials from the vicinity of the property watched, when it could be done without injury to others. But, at best,

the power to remove the boat from the vicinity of the property watched was only incidental, and, on general principles, ought not to be so construed as to empower the watchman to ruin his employers by destroying her, without reference to the comparative value of the property watched and the property destroyed.

The law is rather jealous of the exercise of unlimited powers of discretion in subordinate agents and servants. In some cases, where the master is not at hand to be consulted, as is sometimes the case of the master of a vessel in a foreign port, it will give very enlarged powers to an agent, but this is from the necessity of the case. Here it does not appear, we are aware, that the principal officers of the defendants' company resided in Bridgeport; and that the company kept its office there; but the corporation is entirely within the state, and the principal terminus of the road is at Bridgeport, and it may fairly be presumed that there were officers there of a higher grade than that of night-watchman to one of their sheds; and if there was no one there who could be consulted in such an emergency as this, we think, at least, it ought to be shown, before it is assumed that it falls within the general powers of this subordinate agent, for a special purpose, to destroy a valuable vessel and cargo in order to save property of very trifling importance comparatively. The law will not presume that a principal, for any purpose, would authorize an agent to take and convert property to his own use that did not belong to him; and if it will not confer this power on an agent, we see no more reason for its conferring on him a power to destroy than to take property; and we certainly should require some direct and controlling authority before we should feel authorized to hold that where the principal's property is to some extent threatened by a contiguous fire, though in this case it does not appear to have been even threatened to any considerable extent, that the agent has power to remove the property which threatened it out of the way, and by such removal destroy it. No such authority has been produced, and we presume, therefore, none such can be. But however this may be, we are satisfied that the plaintiffs cannot recover in this case, even assuming the authority of the watchman, as the agent of the defendants, to cut the vessel loose, on the ground that it endangered the property he was employed to watch, to be unquestionable.

The principle that subjects a master for the tortious act of the servant done in the performance of the master's business, and within the scope of the general authority conferred, is the same

as that which subjects him for the act of his servant done by his express direction given at the time. In both cases the maxim applies, *Qui facit per alium facit per se*, and the master shall be responsible for the acts of his agent to the same extent that he would be if he personally committed the wrong. But the remedies applicable to these several injuries are entirely different. In the former case he is liable only in an action upon the case founded upon the negligence of the servant in the performance of the master's lawful business. Whereas in the latter case he is liable in an action of trespass caused by the act of the servant. But his liability to be sued in trespass does not rest at all upon the relationship of master and servant which exists, but upon the fact that the act complained of was done by his express direction and command, and so, in reality, as well as in law, is his own act, though done through the instrumentality of another. A man shall not be made a trespasser against his will, though he may be made liable in an action on the case for the negligence of the servant, while engaged in the business of the master, however contrary to the master's wishes such negligence may be; and the reason is because he who is damaged ought be recompensed; and a man must so use his own as to do no injury to another; and where one of two innocent persons must suffer, it is more reasonable that he should suffer whose act of employing an unskillful or negligent servant was the cause of the injury, than that the other, who has been wholly in the right, should be compelled to bear a loss brought upon him through another's want of care in not attending to his own business and in intrusting it to the carelessness of his servant.

The law never imputes malice or a wanton and willful trespass to the transaction of any lawful business, contrary to the wishes of the party, any more than it will impute crime. These acts may be done through the instrumentality of agents; but it must be shown as a fact that they were ordered, directed, or authorized to be done; the law will never infer this from the mere relation of master and servant. Undoubtedly this relation may be a circumstance proper to be shown, in connection with other facts tending to show that the act complained of was done by the command of the master; but unless the act of trespass is the natural or necessary consequence of something which the master has ordered to be done, it will not alone be sufficient to subject the master. The old authorities on this subject were all examined in the leading case of *McManus v. Crickett*, 1 East, 106, in which it was explicitly held that a master

was not liable for the willful act of his servant. The substance of these old authorities is very well condensed in the opinion of the court, as expressed by Lord Kenyon in that case. "It is a question," says that learned judge, "of very general concern, and has been often canvassed, but I hope at last it will be at rest. It is said in Bro. Abr., tit. Trespass, pl. 435: 'If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished.' And in 2 Roll. Abr. 533: 'If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I, because by the voluntary putting of the beasts there without my assent he gains a special property for the time, and so for this purpose they are his beasts.' And in Noye's Maxims, c. 44: 'If I command my servant to distrain, and he ride on, the distress, he shall be punished, not I.' And it is laid down by Holt, C. J., in *Middleton v. Fowler*, Salk. 282, as a general position, 'that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Again, says Lord Kenyon: 'This doctrine does not militate with the cases in which a master has been holden for the mischief arising from the negligence or unskillfulness of the servant, who had no purpose but the execution of the master's orders; but the form of their actions proves that this action of trespass cannot be maintained.'

The fact that the act of cutting the cables was a direct injury which would render the watchman liable in trespass had he been sued makes no difference. This appears, negatively, from the fact that no case can be found where an action of trespass has been sustained against a master for the acts of a servant, where such acts were not expressly ordered or authorized to be done; or where they were not the natural or probable result of something which the servant was ordered to do, which ordinary care in the execution of the master's orders would not guard against; as was the case of *Gregory v. Piper*, 17 Eng. Com. L. 266. The distinction between the trespass of the servant and the liability of the master for negligence, arising from an act which might amount to a trespass in the servant, is very well illustrated by the case of *Croft v. Alison*, 6 Id. 614. There the action was case against the master for the negligence of the servant in striking the plaintiff's horses, and the plaintiff recovered. At the time when the horses were struck, the carriage of the plaintiff became entangled with the carriage of the defendant. The chief judge told the jury to find for the defendant if the entan-

gling was the result of the moving of the plaintiffs' horses, which were left without a driver, and the whipping was for the purpose of extricating himself from that situation; but to find for the plaintiffs in case the entangling arose from the fault of the defendant's coachman. The court, in sustaining this charge, say, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horse of another person, and produce the accident, the master will not be liable. But if in order to perform his master's orders he strikes, but injudiciously, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment.

The English cases on this subject are collected by Smith on Master and Servant, law-library edition, pages 172 to 193, inclusive, where the views which we have here expressed will be found to be fully sustained. Indeed, so long ago as the case of *Morley v. Gaisford*, 2 H. Black. 442, it was said by the court that it was difficult to put a case where the master would be considered as a trespasser for an act of his servant which was not done at his command.

And we find nothing in our own reports, or in the reports of any of the states, which at all militates against the English cases: *Wright v. Wilcox*, 19 Wend. 343 [32 Am. Dec. 507]; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill (N. Y.), 480; *Wilson v. Peoverly*, 2 N. H. 548; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479 [51 Am. Dec. 315]; *Church v. Mansfield*, 20 Conn. 284.

As, therefore, there was no proof that the defendants ordered or directed their watchman to cut the cables of the plaintiffs' vessel; and as this act was not a necessary or natural or probable result of anything that he was ordered to do, even in the emergency, as he considered it, when he did cut it, it appears to us that the defendants cannot be made liable in trespass for this act; and the nonsuit was consequently correctly ordered. There was a question of evidence made on the trial whether the declarations of Hawley, the defendants' superintendent, were admissible under the circumstances; but the result to which we have come makes it unnecessary to consider that question, and we do not therefore intend to decide it. There is no error in the judgment complained of.

In this opinion **WATKIN**, C. J., and **HINMAN**, J., concurred.

Judgment affirmed.

EMPLOYER, WHEN RESPONSIBLE FOR ACT OF EMPLOYEE: See *Moore v. Sunburne*, 59 Am. Dec. 209, note 220, where other cases are collected. Evidence of willful trespass by a servant will not render the master liable as a trespasser, without express evidence that the latter authorized the act: *McCoy v. McKown*, Id. 264, note 266, where other cases are collected.

MASTER IS LIABLE FOR NEGLIGENCE OF SERVANT: See *Powell v. Devaney*, 50 Am. Dec. 738, note 740, where other cases are collected.

THE PRINCIPAL CASE IS CITED by Phelps, J., dissenting, in *Bristol Knit's Co. v. First National Bank*, 41 Conn. 429, to the point that when one of two innocent parties must suffer, it is more reasonable that he should suffer whose act of employing an unskillful or negligent servant was the cause of the injury, than that the other who has been wholly in the right should be compelled to bear a loss brought upon him through another's want of care in not attending to his own business, and intrusting it to a careless servant. It is also cited in *Crocker v. New London W. & P. R. R. Co.*, 24 Id. 266, to the point that the master is not liable in trespass for his servant's act, unless it is shown that the act was done in the execution of his master's order, or with his assent or approbation.

BASSETT v. KINNEY.

24 CONNECTICUT, 207.

AGENT WITH WHOM MONEY IS LEFT AS DEPOSIT FOR DEFUNCT OWNER is bound to pay to such owner the interest that he receives for the use of it while it is under his control.

ACTION for money had and received. The New Haven & New London Railroad Company deposited with the defendant, as treasurer of New London county, for the use of the plaintiff, the sum of eight thousand dollars, the amount of damages awarded to the plaintiff for certain land taken by the company for their road. The said treasurer immediately placed the money in the Norwich Bank where it remained about a year, when it was paid to the plaintiff. After the money was received by the plaintiff the bank paid to the defendant interest which had accrued on the money, amounting to three hundred and twenty dollars. When the plaintiff learned that this interest had been paid to the defendant, he demanded it of him, and being refused, he brought this suit. The court instructed the jury that the plaintiff was entitled to recover on these facts. Verdict for the plaintiff. The defendant moved for a new trial.

J. A. Hovey, for the plaintiff.

Foster, for the defendant.

By Court, WAITE, C. J. The money, when deposited by the railroad company in the hands of Kinney, became the property

of the plaintiff. It was substituted by the company for the land, which they had taken for their use. The interest, paid by the bank, was paid for the use of the plaintiff's money, and became as much his property as the principal itself.

It was upon this principle that the case of *Willis v. Commissioners of Appeals in Prize Causes*, 5 East, 22, proceeded. There a portion of the cargo of a captured ship had been condemned and sold by agents appointed for that purpose. Upon an appeal to the commissioners, the decree of condemnation was reversed, and the agents were ordered to pay over to the owners the net proceeds of the sale, together with the interest from the time of the sale. Upon an application to the court of king's bench, for a prohibition against further proceedings relating to the payment of interest, that court refused to interfere, upon the ground that it was to be presumed that the commissioners had found that the agents had made interest from the funds in their hands, and if so, they were accountable for it. Lord Ellenborough, C. J.: "The case is not brought forward on the ground of contract, but simply on the ground that the proceeds had got into the hands of the agents, and have there grown and accumulated, producing the interest sought to be recovered." And Le Blanc, J., remarked that, taking interest to have been made, he considered it as composing part of the proceeds.

And in the case of *Rogers v. Boehm*, 2 Esp. 703, where the plaintiff sought to recover interest upon money remitted to the defendants, Lord Kenyon observed that there were cases in which the rules of equity and law were the same; that it had been decided, in a court of equity, that "if money had been remitted to an agent, and he suffered it to remain dead in his hands, he should not be liable to interest, but that if he mixed it with his own, or made use of it, he should be subject to the charge of interest."

It is true that Kinney was under no obligation to place the funds, deposited with him as treasurer of the county, upon interest. Had he locked them up in his chest or merely deposited them in the bank for safe-keeping, and received no compensation for the use of them, he would not have been accountable for interest. But having placed them where they drew interest, that interest must be considered as having the same ownership as the principal which produced the interest.

A similar rule applies to funds in the hands of executors and trustees. It was formerly held that as they were not bound to lend, and if they did so it was at their peril, and as they were

liable to bear the loss, they were entitled to the gain. But that doctrine was overruled by Lord Thurlow, and an executor or trustee may now be considered as chargeable with interest, whenever he appears to have made interest: 2 Fonbl. Eq. 183, note p; *Newton v. Bennet*, 1 Bro. C. C. 359.

In this respect, an agent with whom money is deposited for a definite owner stands in a different situation from that of an auctioneer or stakeholder, with whom funds are deposited for the benefit of one of two claimants, and who is bound to keep them, and have them ready to pay over to the party entitled to them as soon as the question of title is determined. In such case he is not generally chargeable with interest, although he may have used them as his own: *Jones v. Mallory*, 22 Conn. 386; *Harington v. Hoggart*, 1 Barn. & Adol. 577; *Rex v. Watts*, 20 Eng. Com. L. 443; *Lee v. Munn*, 8 Taunt. 45; *Miford v. Elliott*, 1 Moore, 434.

But in neither of these capacities did Kinney receive the money. The very instant it came into his hands it became the property of the plaintiff, and entitled him to all the interest accruing upon it.

In our opinion, therefore, the charge of the court below was right, and we do not advise a new trial.

In this opinion STORRS and HINMAN, JJ., concurred.

A new trial not granted.

INTEREST IS RECOVERABLE AS OF RIGHT WHERE MONEY HAS BEEN USED:
See *Aiken v. Peay's Es'te*, 53 Am. Dec. 684, note 686, where other cases are collected.

UTLEY v. SMITH.

[24 CONNECTICUT, 290.]

WORDS "FAILING CIRCUMSTANCES," USED IN CONNECTICUT INSOLVENT ACT of 1853, are to be construed to mean the closing of business by an avowed and deliberate failure.

bona fide mortgage of his property made by insolvent debtor, in ignorance of his insolvency, not with the intention of closing his business, but with a view of continuing and extending it, is not made "in view of insolvency," within the meaning of the insolvent act.

Mortgage is not void for want of possession taken by the mortgagor, where, immediately after its execution, the mortgagor and mortgagor form a partnership which takes possession of the property and with its avails pays company debts. After the company takes possession, in such a case, there is no possession left in the mortgagor upon

which to raise a presumption of fraud, under the general statute of fraudulent conveyances.

DEBT SECURED BY MORTGAGE IS SUFFICIENTLY DESCRIBED BY THESE WORDS in the condition of the deed: "Whereas the said S., at my request and for my sole accommodation, has agreed to indorse my own negotiable paper, and business paper received by me from others and afterwards by me negotiated, to be made within two years from the date hereof, and also to become my security on other paper from time to time, the whole not exceeding in amount the sum of sixteen thousand dollars at any given time within said two years, and all to be discounted by, or received by, and payable to" certain banks, "and payable at said banks, or any one or more of them, or otherwise; and the said S. has also indorsed for me and become my security on sundry promissory notes, bills of exchange, and other negotiable paper which has not yet come to maturity, a part whereof is due to or payable at one or more of the said banks, and some part thereof in other places not remembered, the whole amounting to about sixteen thousand dollars."

BILL in equity, brought by the plaintiffs as trustees of the estate of Andrew Coe, an insolvent debtor, against Henry D. Smith, Alfred M. Bailey, William R. Smith, and others. The bill prayed that certain mortgage deeds given by Coe to Henry D. Smith might be set aside, and the title to the mortgaged property vested in the plaintiffs. Upon the cross-bills of W. R. Smith, and of Isaac Roberts, trustee of the estate of A. M. Bailey, an insolvent, and the answers of the other defendants, the cause was referred to a committee, who found the facts therein, whereupon the case was reserved for the advice of this court. Roberts, in his cross-bill, prayed that a quitclaim deed to Coe of Bailey's interest in the estate of A. M. Bailey & Co., which was embraced in one of the mortgages from Coe to H. D. Smith, might be set aside and the title to the same be vested in him as trustee. And W. R. Smith, in his cross-bill, prayed that an agreement to form a copartnership between him and Henry D. Smith and Coe might be annulled, and an account taken of the transactions connected with, and the property furnished for, such copartnership. The material facts found by the committee are, that on the fifth of December, 1854, Coe was carrying on one business by himself and another business as a partner with A. M. Bailey, under the firm name of A. M. Bailey & Co. The mill at which the former business was carried on was owned by Coe individually, and the mill at which the latter business was carried on was owned by Bailey & Co. On said fifth of December, Coe executed and delivered to H. D. Smith a mortgage of the mill owned by him individually, with the real estate pertaining to it, and all the personal property in

and upon the same, to secure the mortgagee for sundry indorsements and acceptances previously made by him for the mortgagor, and for like indorsements and acceptances afterwards to be made by Smith for him. The description of the debt secured by this mortgage is stated, in substance, in the last paragraph of the syllabus. Coe, by the permission of H. D. Smith, remained in possession of the property thus mortgaged until the thirteenth of December, 1854, when it went into the hands of Smith, Coe & Co., a copartnership formed at that time. But this possession was not permitted by H. D. Smith for the purpose of concealing the existence of the mortgage or the transfer of the property. At the time of the execution of this mortgage H. D. Smith indorsed negotiable paper of the description mentioned in the condition of the mortgage, for the accommodation of Coe, to the amount of two hundred and twenty-five dollars. He was then bound by indorsements and acceptances previously made to the extent of about forty-two thousand dollars, for which he held partial security to the value, as was then supposed, of eleven thousand five hundred dollars; and he afterwards assumed other liabilities, as indorser or acceptor for Coe, to the amount of two thousand six hundred dollars. But the mortgage was intended to be a security for sixteen thousand dollars only. On the fifth of December, 1854, H. D. Smith was liable, by indorsements or otherwise, upon paper drawn for the benefit of A. M. Bailey & Co., to the amount of about twenty-two thousand dollars, and between that time and the thirteenth of December, 1854, he became liable for them in the same manner for the further sum of about two thousand four hundred dollars. On the thirteenth day of December, 1854, William R. Smith, H. D. Smith, and Coe agreed to enter into a copartnership under the firm name of Smith, Coe & Co., for the purpose of carrying on the business which Coe had previously conducted, and also the business which had been carried on by A. M. Bailey & Co. Large profits were anticipated from the business of the new firm by all the members thereof. On the thirteenth day of December, 1854, A. M. Bailey quitclaimed to Coe all his interest in the real and personal property of A. M. Bailey & Co. This quitclaim deed was given to enable Coe to mortgage the property therein described to H. D. Smith, for security for his liabilities for A. M. Bailey & Co., and to put that property, subject to this mortgage, into the partnership of Smith, Coe & Co., divested of Bailey's interest therein. In consideration of the execution of this deed by Bailey, Coe assumed to

pay certain debts of Bailey, amounting to one thousand five hundred and sixty-three dollars and fifty-one cents; and the Smiths guaranteed the fulfillment of this obligation of Coe. On the thirteenth day of December, 1854, Coe executed a mortgage to H. D. Smith of the property which Bailey had quit-claimed to him, and on the same day this mortgage was recorded. This mortgage was intended to secure H. D. Smith for certain liabilities which he had incurred for A. M. Bailey & Co., amounting in all to fifteen thousand dollars. On the same day Coe mortgaged all the rest of his property, except one lot of land which was already incumbered for nearly or quite its value, to W. R. Smith, for security for debts and liabilities to the amount of eleven thousand four hundred and sixteen dollars and thirty-five cents. The conveyances made by Coe on the thirteenth of December, 1854, embraced all the property of Coe and of the firm of A. M. Bailey & Co. which was liable to execution, except the property mortgaged by him to Smith on the fifth of December, 1854. For eight months prior to this time H. D. Smith had been the principal accommodation indorser for Coe and for A. M. Bailey & Co., solely on the faith of their promise to keep him at all times secured, and some time in July, 1854, they promised to give him a mortgage of the property described in the deeds of December 5 and 13, 1854, to secure him against liabilities which he had then incurred or that he might thereafter incur, as their indorser, acceptor, or surety. These mortgages were given in good faith in pursuance of this agreement. When these mortgages were given, Coe was hopelessly insolvent. A. M. Bailey & Co. were also insolvent, but their books were so kept that none of them knew of his or their insolvency. H. D. Smith was also insolvent at that time. But his insolvency was solely occasioned by the liabilities he had assumed for Coe and for A. M. Bailey & Co. Neither Coe nor the Smiths ever discharged the obligation to pay the debts of A. M. Bailey which, on the thirteenth of December, 1854, they agreed to pay. The only motives of the Smiths in entering into the partnership of Smith, Coe & Co. were to insure, by reason of the large profits expected from the business, the payment of the debts due them by Coe and the extinguishment of the liabilities they had incurred for his accommodation and for the accommodation of A. M. Bailey & Co. At the time of the formation of the partnership both of them were in utter ignorance of Coe's insolvency, and had no knowledge of the liabilities outstanding against him. On the eighteenth of January, 1855, Coe and H. D. Smith severally made assign-

ments of all their property for the benefit of their creditors, in accordance with the provisions of the act of 1853, for the relief of insolvent debtors. When the property of the firm of Smith, Coe & Co. was attached on the fourth of January, 1855, the partnership was dissolved at the request of W. R. Smith, by the mutual consent of the partners, and notice given. The property attached was held by the officer until the twentieth of January, when it was delivered to the plaintiffs as trustees of Coe. After the dissolution of the partnership, none of the partners intermeddled with the property except W. R. Smith, and he did so no further than was necessary to preserve it, and to pay therewith certain debts, which were fairly incurred by the partnership, and for which he supposed the property was lawfully holden. Claims were allowed by the commissioners of Coe's estate to the amount of about one hundred and twenty thousand dollars, in favor of his creditors; the commissioners of the estate of Bailey allowed about twenty-seven thousand dollars in favor of the creditors of Bailey and of A. M. Bailey & Co. The committee also took an account of the moneys received and paid by W. R. Smith after the dissolution of the firm of Smith, Coe & Co., and found that he received five thousand six hundred and forty dollars and seven cents, and paid out two thousand nine hundred and three dollars and twenty-two cents, to which no objections were made by any of the parties. But the plaintiffs objected to the allowance of two thousand two hundred and seventy-eight dollars and forty cents, paid by him on sundry indorsements and liabilities of the firm, and to the allowance of one hundred and fifty-eight dollars and four cents for property purchased for the firm. W. R. Smith also charged for his services in collecting and paying out these moneys the sum of four hundred dollars.

Dutton, for the plaintiffs.

Welles and Carter, for H. D. Smith.

Barnes and T. C. Perkins, for William R. Smith.

By Court, **ELLSWORTH**, J. The important question presented in this case is whether the two deeds of Andrew Coe to Henry D. Smith of the fifth and thirteenth of December, 1854, are or are not fraudulent and void, as contrary to the provisions of the statute of 1853, for the relief of insolvent debtors. The plaintiffs insist that they are; that the deeds were made by an insolvent person with a view to insolvency, and were not within the seventh section of the act, and particularly that they operate

by way of preference among creditors, and must of course be held to be void and of no effect. The defendants, on the other hand, insist that mere insolvency which is subsequently developed does not make the deeds of the debtor fraudulent and void; and that even if the deeds do not come within the exceptions in the seventh section they are not bad, unless they were made with a view to insolvency. The question is one of more than ordinary interest, since it is important in itself, and this is the first time the court has been called upon to construe this statute. We do not, however, hesitate as to the determination to which we should come.

Three things are necessary in order to make the deed of an insolvent debtor fraudulent and void under the statute of 1853: 1. The grantor must be in failing circumstances; 2. The deed must be made with a view to insolvency; 3. The deed must be made with intent to prefer one creditor to another.

The words "failing circumstances," as used in the statute, mean more than actual insolvency, for that is consistent with an honest belief of the insolvent debtor of his wealth and prosperity; the words would seem to imply that the insolvent is about failing and closing his affairs from an inability to continue in business, and to meet his payments; to hold that a debtor honestly pursuing his business, believing he is solvent, or if embarrassed, hoping to extricate himself by continued efforts, and with that view buying and selling in the usual course of business—to hold such a person to be a bankrupt within this statute, and that all who deal with him deal with him at their peril, if it should turn out he was really insolvent at the time would interrupt all business, and create great and general alarm. We construe the words of the statute in a more specific sense, to wit, the closing of business by an avowed and deliberate failure. So Judge Story construed the word "bankrupt," under the bankrupt law of the United States, in *Arnold v. Maynard*, 2 Story, 358. He says it describes one acting in contemplation of actually stopping his business because he is insolvent and utterly incapable of carrying it on.

But not to enlarge on this point, we pass to the second, which, in our view, is entirely decisive of the case. We mean the words "in view of insolvency." What meaning shall we attach to these words? They appear to be very plain and pointed, and we cannot doubt that they are important, and that they fully disclose the object which the legislature had in view in the law. No debtor actually failing shall be allowed to convey away his

property to make preferences among his creditors. Any such conveyance made with a view to insolvency is contrary to the statute, and is utterly void. This is what these words mean, and they mean no more. Actual insolvency is not enough, for this does not necessarily prove any particular view of the insolvent in an ordinary sale or mortgage; his insolvency may have nothing at all to do with it, and be neither the cause nor the occasion of it. It is but a circumstance to be taken into the account in weighing motives, and although it may work a kind of preference, yet if this was not intended by the parties, if the *quo animo* was wanting, and the conveyance was *bona fide*, and in the usual course of business, the conveyance is not contrary to the language or spirit of the statute. It has been claimed that a conveyance to a *bona fide* grantee is liable to be declared void if made by an insolvent in view of his failure, and if it does not come within the cases excepted in the seventh section of the act. This is a point, however, upon which it is unnecessary to express an opinion in this case.

What we have said is confirmed by decisions under the late bankrupt law of the United States, and the entire later decisions in England under their bankrupt law. In *Jones v. Howland*, 8 Met. 377 [41 Am. Dec. 525], the question arose under the late bankrupt law of the United States, which contains this clause: "All conveyances or transfers of property in contemplation of bankruptcy, and for the purpose of giving any creditor, etc., any preference or priority, etc., shall be deemed utterly void, and a fraud upon this act;" the court held that if a party who fears or believes himself insolvent, but does not contemplate stoppage or failure, and intends to keep on and make his payments and transact his business, hoping that his affairs may be thereafter retrieved, and in that state of mind makes a sale or payment, without intending to give a preference, and as a measure connected with going on with his business, and not as a measure preparatory to or connected with a stoppage in business, such sale or payment is not void, as made in contemplation of bankruptcy, within the meaning of the bankrupt act of the United States. Hubbard, J., in giving the opinion of the court, after reviewing the cases, says: "In view of all the authorities, we hold the law to be this, that though insolvency in fact exists, yet if the debtor honestly believes he shall be able to go on in his business, and with such belief pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterward ensue. And on the other

hand, if the debtor, being insolvent and knowing his situation, and expecting to stop payment, shall then make a payment, or give security to a creditor for a just debt, with a view to giving him a preference over the general creditors, such payment or giving security is fraudulent as against the creditors; and property that is transferred in making such payment, or giving the security, may be recovered by his assignee. The whole rests upon the intent with which the act was done, and the intent is to be proved as a fact. In *Fidgeon v. Sharpe*, 5 Taunt. 541, Gibbs, C. J., says: "The cases in which the doctrine of contemplation, in cases of bankruptcy, was introduced make it depend on the *quo animo*. In *Morgan v. Brundrett*, 5 Barn. & Adol. 289, Patterson, J., says: "A man may be insolvent, but yet not contemplate bankruptcy;" and Parke, J., says: "The meaning of the words 'in contemplation of bankruptcy' I take to be that the payment or delivery must be with intent to prevent the general distribution of effects which takes place under a commission of bankruptcy." From the English cases, which are all collected and commented upon by Hubbard, J., we derive this rule, and we think it is the true one, that the *quo animo* is the important and decisive characteristic. In the *Matter of Alonzo Pearce*, in the district court of the district of Vermont, reported in 6 Law Rep. 261, Prentiss, J., says, in speaking of a conveyance by a bankrupt: "I think it must appear that the debtor, in making the transfer, though he did it voluntarily, and while in fact insolvent, acted in contemplation of bankruptcy, i. e., in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared a bankrupt, on his own instance, on the ground of inability to pay his debts, and intending to defeat the general distribution of effects which takes place under a proceeding in bankruptcy."

It was contended by the plaintiffs that a man must be supposed to know the state of his affairs, and to have acted with reference to his insolvency, however really ignorant of the fact, if subsequent developments make it manifest that at the time he was in fact insolvent. Hence it is said that when Coe mortgaged his property to Smith, he did it in view of his insolvency and failure, and with intent to prefer Smith to his other creditors, or, at least, that this must be held to be true, however untrue in fact. We cannot give an assent to this course of reasoning. The committee expressly find that the parties had no knowledge or belief of the insolvency of Coe, and that his deeds to Smith were *bona fide*, and not made in view of failing

and stopping, but with a view to the continuance and extending of business in a new partnership connection. Were the intention of Coe otherwise, and not *bona fide*, as the committee find, but to prefer Smith above the general creditors, or if the question of intention were open for our review, and we were decided what the intention of the parties was in forming a new company to carry on this business, we might possibly come to a different conclusion from the committee. But we are not permitted to do this, although it was claimed on the argument that we could, and so we are concluded upon the question of *quo animo*, and therefore cannot, as matter of law, against the finding, pronounce the deeds to be void as a fraud on the insolvent law of this state.

The third thing which will make void the deed or assignment of an insolvent debtor, wherever it is found, is the intent of the grantor or assignor to make a preference among creditors and prevent an equal distribution of assets. This is too clear to admit of any question whatever. Equality among creditors is the great thing aimed at by the legislature; not to interfere with sales and payments in the ordinary course of business, nor to prevent debtors from paying or securing their creditors with a view of continuing business. Now, we look in vain for any such purpose or intent accompanying the mortgages of Coe to Smith, and hence those instruments are not void in view of the statute.

It was said on the argument that those deeds are fraudulent and void, under our general law of fraudulent conveyances, for the want of possession, taken by the mortgagee. Assuming, as we must, under the finding of the committee, that the mortgages were *bona fide*, and free from the objections already commented upon, that there was no covert design in forming the company of Smith, Coe & Co., and that the company took possession of the property, and with the avails of it paid company debts and assumed company liabilities, we do not see any force in the objection to their fairness and validity. The fact of Coe's being a member of the new company cannot make any difference, since he could and did part with his possession to them, and has given the creditors of the company a good and valid lien on the property for their debts. There was no possession left in Coe upon which to raise a presumption of fraud, under the general statute of fraudulent conveyances.

Another claim made is, that the deeds are void under our registry act, because the debts are not well described in the condition of the deeds. Were this an original question, it would

be difficult, we think, to sustain the deeds against this objection, but it is not; and although our early decisions would hold them void for vagueness, our decisions for the last ten and fifteen years have gone further, and established the law to be liberal enough to sustain mortgages quite as indefinite and vague as the present. Of course debts not paid or assumed before the general assignment of Coe would not be secured; nor any debts exceeding the sum stated in the condition.

From the report, it appears that William R. Smith, who was a partner in the company of Smith, Coe & Co., received, as such, from the personal estate conveyed to the company, five thousand six hundred and forty dollars and seven cents. The company had a good title to this property, if the views already expressed are to be considered as correct, and hence William R. Smith is liable to account for it as a partner, only for the benefit of the creditors of Smith, Coe & Co. Upon the foregoing premises, it is agreed that he is entitled to charge that fund with two thousand nine hundred and three dollars and seven cents, and we think he may charge the further sum of two thousand two hundred and seventy-eight dollars and forty cents for company debts paid, and four hundred dollars for his services, and may retain company property, or effects, to the amount of one hundred and fifty-eight dollars more, for company debts yet unpaid.

We advise that the accounts be settled on these principles.

Other questions have been made and argued at much length, which we pass over as not material to the final disposition of the case.

In this opinion STORRS and HINMAN, JJ., concurred.

SALE MADE BY INSOLVENT, WHO HONESTLY BELIEVES HIMSELF ABLE TO CONTINUE BUSINESS, in payment of a just debt, and without a design to give a preference, is not fraudulent within the meaning of the United States bankrupt act of 1841: *Jones v. Howland*, 41 Am. Dec. 525; see note to that case for other cases on this subject.

DESCRIPTION OF DEBT SECURED BY MORTGAGE, WHAT SUFFICIENT: See *Merrills v. Swift*, 46 Am. Dec. 315; *Boody v. Davis*, 51 Id. 210.

MERELY LEAVING MORTGAGED PROPERTY IN POSSESSION OF MORTGAGOR, from motives of kindness, does not render the mortgage invalid: *Bumpas v. Dotson*, 46 Am. Dec. 81, note 85.

MORTGAGE TO SECURE FUTURE ADVANCES IS VALID: See *Bank of Utley v. Finch*, 49 Am. Dec. 175, note 177, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Hamilton v. Staples*, 34 Conn. 323; and in *Hall v. Gaynor*, 37 Id. 553, to the point that conveyances by a debtor are not within the insolvent law where the grantor is neither in failing circumstances, nor makes them in view of insolvency; in *Bloodgood v. Brewster*, 35 Id. 450,

to the point that the *quo animo* with which a conveyance is made by a debtor must be proved as a fact, and cannot be inferred or presumed to exist, by inference of law, contrary to the fact; in *Crosswell v. Allis*, 25 Id. 312, to the point that a mortgage which is not made by a mortgagor in failing circumstances is not rendered invalid by the insolvent act of 1853; and in *Quisenberry Bank v. Brewster*, 20 Id. 562, to the point that a mortgage made *bona fide* in the usual course of business is not contrary to either the language or spirit of that statute.

MONTAGUE v. RICHARDSON.

[*24 Connecticut, 328.*]

WORD "NECESSARY," IN CONNECTICUT STATUTE EXEMPTING FROM EXECUTION Household Furniture of the debtor, while it excludes superfluities and articles of luxury, fancy, and ornament, embraces those things that are requisite to enable the debtor not merely to live, but to live in a convenient and comfortable manner.

STATUTE OF CONNECTICUT EXEMPTING CERTAIN PROPERTY OF DEBTOR FROM EXECUTION is a remedial one, and having been passed for a humane purpose, ought to be liberally construed in furtherance of the benevolent objects for which it was enacted.

LAW EXEMPTING FROM EXECUTION NECESSARY FURNITURE OF DEBTOR exempts such articles as are necessary when the levy is made, and not merely those that were necessary when the law was passed.

WHETHER APPARATUS CALLED RANGE IS STOVE or not, within the meaning of the statute exempting certain property from execution, is a question of fact to be submitted to the jury.

TRESPASS against the defendants for taking and carrying away certain articles of household furniture, the property of the plaintiff, and claimed by him to be exempt from execution. The facts necessary to a correct understanding of the points decided are stated in the opinion.

Buel, Peck, and Harrison, for the plaintiff.

Baldwin and Blackman, for the defendant.

By Court, Sturges, J. The principal question in this case involves the correctness of the construction given by the court below to the statute, which, among other property, exempts from warrant or execution "bedding and household furniture necessary for supporting life;" R. S., c. 1, sec. 179, p. 112. The jury were instructed that this provision exempts only such articles of furniture as are indispensably requisite for supporting the lives of the debtor's family. We are of opinion that this is too rigid a construction of the phrase "necessary for supporting life;" or rather, of the word "necessary" contained in it, which would have given to the provision the same meaning if

the succeeding words, "for supporting life," had been omitted; since it is obvious that the word "necessary" would imply a necessity for some particular purpose, and that could only be the supporting of life. It was accordingly assumed in *Davlin v. Stone*, 4 Cush. 359, that the word "necessary" which was used in the Massachusetts statute, exempting, after an enumeration of some specific articles, "other household furniture necessary for the debtor and his family, not exceeding fifty dollars in value," without expressing the purpose for which such necessity should exist, implied that that purpose was the support of the debtor's family. The inquiry before us is as to the true sense in which the word "necessary" was used in the law now in question. On this point we derive no aid from the phraseology of the former statutes, in relation to the exemption of household furniture from legal process. They differ from the present law in their arrangement; but otherwise they are all alike, excepting that for the word "upholding," which is used in the ancient statute, the synonymous word "supporting" is substituted. We think that the term "necessary" was not intended to denote those articles of furniture only which are indispensable to the bare subsistence of the persons for whose benefit the law was designed, the debtor and his family. According to such a limited construction, it would exclude many things which universal usage and the common understanding of that word, in reference to this subject, have pronounced to be necessary articles of household furniture; and would indeed protect merely those rude contrivances which are used only in a savage state. The word was obviously used in a larger sense; it was intended to embrace those things which are requisite, in order to enable the debtor not merely to live, but to live in a convenient and comfortable manner. It however excludes superfluities and articles of luxury, fancy, and ornament, as remarked by Shaw, C. J., in *Davlin v. Stone, supra*: "It was not used in its most rigid sense, as something indispensable and without which the debtor cannot live, but something so essential as to be regarded among the necessaries, as contradistinguished from luxuries." The word "necessary" has properly and frequently, in common parlance, a limited and qualified signification, and indicates means for the accomplishment of a purpose, which are reasonably requisite and proper for that purpose under the circumstances of the case, rather than those without which it would be absolutely impossible for it to be accomplished. And such is the sense in which it would be commonly used and understood in our community.

in speaking of furniture necessary for supporting life, or necessary for housekeeping, or necessary for a family. In this sense the word was, in our opinion, used in the act in question, as, indeed, it is in many others.

The exposition of this term by Chief Justice Marshall, in reference to the meaning of it in a particular clause of the constitution of the United States, is applicable to this act. He says: "Does it always import an absolute physical necessity so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense, in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. * * * This word, then, like others, is used in various senses; and in its construction, the subject, the context, the intention of the person using it, are all to be taken into view:" *McCulloch v. Maryland*, 4 Wheat. 316.

The statute in question is a remedial one, and being passed for a humane purpose, ought to be liberally expounded in favor of humanity, and in furtherance of the benevolent objects for which it was enacted. The interest of creditors does not, as has been claimed, require a greater strictness in its construction than the one we have adopted, on the ground that they would otherwise be seriously affected in regard to the collection of

their debts. The law was prompted by an enlightened view to the interest of creditors, as well as of debtors, and in our opinion our construction will advance the interests of both, while the narrow and rigid construction contended for would not operate generally for the benefit of either. A reference to the decisions of the courts in the other states upon similar statutes, some of which are in their terms like our own, will show that they have uniformly favored the same liberal rule of construction which we have adopted: *Crocker v. Spencer*, 2 D. Chip. 68 [15 Am. Dec. 652]; *Leavitt v. Metcalf*, 2 Vt. 342 [19 Am. Dec. 718]; *Freeman v. Carpenter*, 10 Id. 435 [83 Am. Dec. 210]; *Richardson v. Buswell*, 10 Met. 506 [43 Am. Dec. 450]; *Davlin v. Stone*, 4 Cush. 359; *Peverly v. Sayles*, 10 N. H. 356.

In regard to the kind, quantity, and quality of the articles of furniture which would be exempted in particular cases under this law, it is obviously impracticable to prescribe or specify them. Each case, as it arises, will depend on its own peculiar circumstances, and present the question, as one of fact, for the jury to determine whether the exemption exists according to the exposition of the law which we have given.

We do not concur in the suggestion that this law exempts only such articles as were necessary at the time when it was passed. Some articles of furniture greatly conducive to convenience and comfort, and proper for every family, have been since invented, and others which would then have been deemed superfluous have now ceased to be so, and are properly considered to be necessary. The inquiry is whether the article in question was necessary when it was levied on by the creditor.

On this point there should be a new trial.

The question whether the apparatus called a range was a stove was, on the conflicting claims of the parties as to its character, one of fact, and as such properly submitted to the jury.

The question of evidence which has been argued before us is presented so unintelligibly on this motion that an examination of it would probably serve no useful purpose, and as it is not necessary, we do not attempt to express any opinion upon it.

In this opinion ELLSWORTH and HINMAN, JJ., concurred.

New trial to be granted.

STATUTE EXEMPTING "TOOLS NECESSARY FOR USUAL OCCUPATION" is not to be restricted to tools of absolute necessity, but includes all tools reasonably necessary for the prosecution of the debtor's work advantageously and usefully, including such new tools as he may have made or acquired which

are better adapted to the prosecution of his labor than those commonly used by his craft: *Healy v. Bateman*, 60 Am. Dec. 94, note 96, where other cases are collected. Articles "necessary for supporting life" are not restricted to articles indispensable to subsistence, but include those of comfort and convenience: *Bryant v. Town of Bradford*, 50 Conn. 253, citing the principal case. The statute exempting from execution household furniture of the debtor should not be construed so narrowly as to exempt only such articles as were necessary at the time of its passage, but should be construed as applying to articles necessary when the levy is made by the creditor: *Seeley v. Guillim*, 40 Id. 110, citing the principal case.

STATUTE EXEMPTING PROPERTY FROM EXECUTION SHOULD BE LIBERALLY CONSTRUED: *Favers v. Glass*, 58 Am. Dec. 272, note 273, where other cases are collected.

HARTFORD & NEW HAVEN R. R. CO. v. JACKSON.

[24 CONNUTHOUT, 514.]

To CONSTITUTE CONTRACT, PARTIES THERETO MUST ASSENT TO SAME THING in the same sense.

WHERE ONE PARTY TO CONTRACT, AFTER HE DISCOVERS MISTAKE on his part as to the terms thereof, and while he is conscious that the other party has no knowledge of the mistake, proceeds to perform his part of the contract, such performance is not conclusive evidence of his assent to the terms of the contract as understood by the other party, nor does it preclude him from showing that there was a mistake. The question whether or not he assented to the contract as understood by the other party is, in such a case, merely a question of fact to be determined by the jury, on all the evidence before them. The facts and circumstances tending to show such an assent on his part are not entitled, as evidence, to any artificial effect, but are to be weighed like ordinary circumstantial evidence.

ASSUMPTIUM to recover the price of transporting fifty thousand laths from Middletown to Hartford. It was proved on the trial that the defendants applied to the agent of the plaintiffs at Middletown to transport from that place to Hartford fifty thousand laths. They asked him what the freight would be, and he asked them how many bundles there would be. They turned to a companion who was with them and asked him how many bundles that would make, and he said it would make five hundred bundles; but the agent understood him to say one hundred bundles, and gave them the price of the transportation of one hundred bundles. The defendants agreed to pay the price, and soon after left. They told the agent they wanted him to start them on their way that day. When the laths were brought to the station the agent perceived by the large quantity of laths that there was some mistake, and sent word by the teamster

who brought the laths to the defendants to come and see him about the matter, and that there was a mistake. This message did not reach the defendants, as they had already left for Hartford, where they resided. The agent, feeling bound by his promise to send the laths that day, forwarded them to Hartford on the first freight train. The plaintiffs sued to recover the usual price for the transportation. The other facts are stated in the opinion.

Hooker and Hawley, for the plaintiffs.

Robinson, for the defendants.

By Court, STORRS, J. The misunderstanding by the plaintiffs of the offer which was made by the defendants in regard to the quantity of laths which the latter proposed to have transported, and which was in form assented to by the former, prevented that meeting of the minds of the parties, that *aggregatio mentium*, which was essential in order to constitute a contract between them; and such assent no more bound the plaintiffs than if the offer had been made by the defendants in a language which the plaintiffs did not understand, through an interpreter who had falsely translated its terms. In order to constitute a contract, it is necessary that the parties should assent to it, and, as is well expressed by Mr. Parsons in his treatise on contracts, p. 899, "they must assent to the same thing in the same sense." The proposition of one party must be met by an acceptance of the other which corresponds with it, which cannot be the case when the proposition is misunderstood by the party to whom it is made. On this point there does not appear to have been any controversy on the trial. But the defendants claimed that the act of transporting the laths by the plaintiffs, after they discovered the mistake that had occurred in making the contract, and while they were conscious that the defendants had no knowledge of the mistake, constituted in law, or was conclusive evidence of, an assent by the plaintiffs to the terms of the contract as understood by the defendants to have been agreed to, and that the plaintiffs were therefore precluded from setting up that there was any such mistake. The plaintiffs insisted that the forwarding of the laths neither constituted, as matter of law, nor was conclusive evidence of, such an assent, but that it was in connection with all its circumstances only evidence to be submitted to and considered by the jury on the question whether the plaintiffs assented to the defendants' terms. The court below charged the jury in conformity with

the claim of the defendants. In this we think there was error. If for the present purpose we-concede, as the parties appear to have done on the trial, that there would be no legal objection to the consummation of the contract by the plaintiffs by an assent on their part to the terms offered by the defendants given after the parties had terminated their negotiation respecting it, and finally separated without any further treaty on the subject, we are of opinion that whether there was such an assent was from its nature in this case a question of fact merely, to be determined by the jury, on all the evidence before them. An assent to an offer which is requisite to the formation of an agreement is an act of the mind; and is either express or evidenced by circumstances from which such assent may be inferred. In the present case, it was neither proved nor claimed that there was any express assent; but certain facts, including the forwarding of the property by the plaintiffs, and the circumstances attending such forwarding, were proved, from which it was proper to reason that an assent was given to the defendants' offer by the plaintiffs; and such reason was to be submitted to the jury, whose province it was to determine their weight. These facts and circumstances, however, were not, as evidence, entitled to any specific or artificial effect; they were to be considered simply with reference to their natural weight, like ordinary circumstantial testimony. We are aware of no rule of evidence or principle of policy or justice which gives them any greater force. The fact that the plaintiffs forwarded the property, if unexplained, would certainly, as evidence, be a strong one on the question of assent; but to hold it to be conclusive on that point might produce great injustice, since it was obviously one which from its nature was susceptible of an explanation which would clearly repel the claim that it was intended to evince such assent. As the judgment complained of must be reversed for the error in the charge below on this point, it is unnecessary to consider any of the other errors assigned.

The superior court is advised that there is error in the judgment complained of.

In this opinion ELLSWORTH and HINMAN, JJ., concurred.

FULL AND FREE ASSENT TO CONTRACT IS NECESSARY to make it binding; See *Jordan v. Toulmin*, 44 Am. Dec. 448, note 463; *Johnston v. Feaster*, 32 Id. 738. In order to make a contract binding, the parties must assent to the same thing in the same sense: *People v. Auditor General*, 17 Mich. 183; *Davis v. Bush*, 28 Id. 435, both citing the principal case; see also *Rogers v. Collier*, 23 Am. Dec. 153.

SMITH v. LEWIS.

[24 CONNECTICUT, 624.]

PARTY TO CONTRACT FOUNDED ON CONCURRENT CONDITIONS SEEKING TO RECOVER FOR BREACH thereof must show that he was ready and willing to perform his part of the agreement.

REFUSAL TO PERFORM HIS COVENANTS BY ONE PARTY TO CONTRACT founded upon mutual conditions will excuse a want of entire and absolute preparation by the other party.

VOLUNTARY ABSENCE OF ONE PARTY FROM PLACE ASSIGNED FOR PERFORMANCE of a contract is equivalent to a refusal to perform on his part, and excuses the other party in suspending preparations for performance on his part, whenever such suspension would be the natural effect of just and reasonable inferences drawn by the latter from such absence and its attendant circumstances.

SEALED EXECUTORY CONTRACT CANNOT BE DISCHARGED BY EXECUTORY VERBAL AGREEMENT.

ACTION on covenant to exchange real estate. The facts are stated in the opinion.

L. F. Robinson and W. D. Shipman, for the plaintiff.

Hooker and Philleo, for the defendant.

By Court, Storrs, J. The parties were under covenant obligations to exchange real estate on a day certain. A place of meeting had been provided for, by verbal arrangement, as they resided in different towns; and it was further agreed that they should together proceed to an attorney's office, where the necessary conveyances might be drafted at the proper time. The plaintiff repairs to the place in question, which is the residence of the defendant, in another town, for the purpose, honestly entertained, of performing the contract. The finding shows that the plaintiff had it in his power to perform (unless prevented by extraordinary contingencies, the occurrence of which a court will never presume or imagine), and that he would have performed, had the defendant presented himself, within a reasonable time, to receive the benefit of the plaintiff's acts. The defendant remained absent during the whole day, and as no excuse is offered for this breach of duty, we are compelled to infer that it was intended to defeat the contract, and fraudulent. That it was a refusal is conceded. The only defense set up is that the plaintiff failed to finish certain formal acts of preparation, and to make an outward manifestation of his ability to the fullest extent possible. It seems to be claimed that he was bound to do everything towards performance that the defendant's absence did not render physically impossible—that the

absence excused no other defects of performance than those which it was impossible for him to have supplied, without the defendant's presence. Such a claim is an interposition of extreme technical suggestions against the requirement of common honesty, and brings to mind the just observation of Lord Kenyon in a similar case: *Rawson v. Johnson*, 1 East, 206. "However technical rules are to be attended to, and in some cases they cannot be dispensed with, yet in administering justice, we must not lose sight of common sense; and the common sense of this case will not be found to militate against any rule of law." At all events, however, such a case as the present, or as that of *Cort v. Ambergate etc. Railway Company*, 6 Eng. L. & Eq. 230, might have been decided in Lord Kenyon's time, we cannot but think that, in this age, a court would be slow to overrule the principle of justice recognized in the latter decision, and which we have endeavored to apply to the present action.

It is not claimed that a tender of performance is necessary to entitle the plaintiff to a recovery; that was physically impracticable. But it is justly said that the proof must show that the plaintiff was "ready and willing" to perform; and the disposition and ability being proved, the only remaining objection relates to the degree of preparation. The plaintiff had not his money in his formal possession; he had not cleared his own estate of incumbrances; and had not prepared the title-deeds of his property; all these preparations he had suspended, in view of his arrangement to meet the defendant, at which he expected some facilities to be furnished by the defendant, not necessary but convenient to himself; but all which preparations he was able to complete, and would have completed, if the defendant had not by his absence, under the peculiar circumstances of the case, induced him to desist. By yielding to this inducement, it is said, he has defeated his own right to a recovery. The argument is, that, although the plaintiff was naturally and rightfully convinced, by the unexplained and evidently contrived absence of the other contracting party, that the latter was determined to break the contract, and was thereby dissuaded from the nugatory and superfluous acts of taking his money into his manual possession, of procuring the release of mortgages and actually drafting and acquiring conveyance of his own real estate, he thereby fell short of his duty; that there is a legal and arbitrary standard of readiness, which is not to be affected by the absence of the other party; that the legal effect of absence is limited to the mere excuse of the tender of performance; that, in cases like

the present, the act of a party will not, as his declaration would, justify the other in attaching to it an ordinary and natural import; that the act of absence, no matter what its attendant circumstances, or how clearly it reveals a fraudulent intent to violate a contract, has a limited and arbitrary legal effect; and that a party, who by such conduct actually causes another, not unreasonably, to suspend the further performance of his contract, can take advantage of his own wrong, and set up the defect of performance as a breach of legal duty; that the party claiming to be excused must show that he is excused by the law, and not by the other contracting party; as if there were any legal duty under a contract, which the parties may not dispense with by their own voluntary acts.

Notwithstanding some confusion in the decisions, arising from the endeavor of courts to apply, in this class of controversies, the principles of common reason and justice to the particular case, we have been unable to find that any such legal and arbitrary standard of readiness exists as is thus suggested, or that there is any prescribed legal effect to the willful absence of a contracting party from the place of performance, or that the extent of necessary preparation may not vary with circumstances, and the attitude of the other party, or that a refusal will only excuse from such covenant duties as it may render impossible to perform. On the contrary, we think it to be a demand of justice that a willful refusal, with which a willful absence is conceded to be identical, will excuse the performance of all acts, including formal acts of preparation, of which the refusal fairly imports a renunciation and disavows the acceptance; in other words, of all acts, of the failure to do which the premeditated conduct of the other party is, in a just and reasonable sense, the direct and undeniable cause.

In the case above referred to, *Cort v. Ambergate etc. Railway Co.*, a party had covenanted to manufacture and to furnish the defendants with a specified quantity of certain necessary parts of a railway track, to be paid for on delivery. Before the contract was completed the company gave notice that they had no occasion for any more of the articles in question, and should not pay for them if forwarded. No more, therefore, were manufactured or tendered, and a suit was brought, not for the quantity delivered, but on the covenant itself; the declaration alleging a readiness and willingness to deliver the residue of the property, and a refusal, on the part of the defendants, to accept it. These allegations were traversed, and the defendants insisted that they

had manifestly never refused to accept that which could never have been tendered to them, and that the plaintiffs plainly were not "ready and willing" to deliver goods which never had been in existence. And they might have argued, as is argued here, that their refusal to pay for any more articles did not prevent the plaintiffs from manufacturing and tendering the residue, and that the latter should have done this before averring a readiness to perform their duty under their special contract. The court were thus compelled to decide whether there was any technical standard of readiness to be adhered to, at all events, by the party seeking to recover upon such covenants, or whether formalities of preparation might be dispensed with, after a refusal by the other party. Lord Campbell, in justifying the jury in finding that the plaintiffs were ready and willing to perform the contract, emphatically says: "In common sense, the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendants." The defendants having insisted that they did not prevent or discharge the plaintiffs from furnishing the residue of the property, the court say further: "May I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act being done except by physical force or brute violence?" And again: "'Discharge' only means, like 'prevent,' that the act of the plaintiffs was the cause of the residue of the chairs not being delivered, and of the contract not being further executed or performed."

The case before us does not require us to go to the full extent of the decision just cited. In that transaction there was a physical impossibility of completing the preparation requisite to constitute an absolute "readiness" on the last day of performance; the present plaintiff, had the defendant appeared at a reasonable hour, could have perfected his preparations. But from the English decision we draw the important inference that a refusal of one party to perform his covenants will excuse a want of entire and absolute preparation by the other. The doctrine, however, was not new. In *Jones v. Barkley*, 2 Dougl. 684, one of the concurrent acts to be performed was the execution and delivery of an assignment of an equity of redemption. The plaintiffs averred that they had offered to execute, and tendered an unexecuted draft of such an assignment, but that the defendant absolutely discharged the plaintiffs from executing

the same, or any assignment or release whatever. The argument was that this was insufficient; that "the plaintiffs ought to have done everything they had engaged to do, as far as was in their power, without any concurrence of the defendant; they might have executed a release, but instead of doing so they only tendered a draft of a release." Lord Mansfield pronounced the judgment of the court. "If ever there was," said he "a clear case, I think the present is. * * * The question is, Was there a sufficient performance? The party must show he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further, and do a nugatory act."

We are called upon to determine simply whether the voluntary and fraudulent absence of the defendant was such a refusal as to be the direct and reasonable cause of the plaintiff's omission to complete his preparations. If this were not so, he would fall short of a legal readiness to perform. If it were so, we cannot assent to the claim of the defendant that the effect of such an absence was only to dispense with such acts as the plaintiff could not perform without the defendant's personal presence. As a place of meeting had been expressly assigned, and an arrangement had been made for completing at least some of the necessary preparations of the plaintiff after the parties should meet, we think that the plaintiff was justified in concluding, after waiting until the latter part of the day, that the defendant was willfully absenting himself, as we also think the finding shows the fact really was, and meant thereby a total and absolute refusal to execute the contract; that the plaintiff was justified in treating this conduct of the defendant in the same manner as if the defendant had met him in the early part of the day, and told him that he need not take another step towards the consummation of their agreement; that as for himself (the defendant), he would not under any circumstances perform. Had this been done, it would not be insisted that the plaintiff should, notwithstanding, have proceeded to take his money into his manual possession and remove the incumbrances on his land. We think that the defendant's absence was the cause of the plaintiff suspending his preparations; that the latter acted reasonably in permitting himself to be operated upon by the defendant's conduct as he was, and in drawing the inference from it which he did, and that the defendant should not now be permitted to set up a defect of readiness on the plaintiff's part, of which he was himself the cause, and from which he thereby ex-

cused and discharged the other. In short, we do not sanction the idea that a willful absence from the place appointed for the completion of a contract, especially when it is previously understood that a part of the preparations are to be there made, is equivalent only to a waiver of tender of performance; but that it carries with it an excuse for a suspension of formal preparation, whenever such suspension would be the natural effect of reasonable and just inferences drawn by the other party from such absence and its attendant circumstances. Such would be the case with an express refusal; there is no just reason why the conduct of a party should not bind him to the same extent as his words. That a voluntary absence, such as we are considering, has a greater effect than is assigned to it by the defendant's counsel, is apparent from a case cited at the bar: *Southworth v. Smith*, 7 Cush. 391. Upon a claim made that the money to be tendered, in fulfillment of a contract with a party fraudulently absent, should have been counted, and that for failure to do this the defendant had not done all that was necessary, the court held that the same reason which excused an actual tender was a sufficient answer to the other objection suggested, although it was clearly an act which the absence did not prevent. Having concluded that the plaintiff was ready and willing in all particulars, except in such as he was excused and discharged from completing by the fault of the defendant, we think him entitled to recover.

As to the other point in the case, we are of the opinion that the court properly refused to hear evidence relative to a parol executory discharge of a sealed executory agreement. Whatever modifications may have been permitted by courts of the old common-law maxim, *Unumquodque ligamen dissolvitur eodem ligamine quo ligatum est*, and whatever may be the extent to which the courts of this state would adopt them, we are not aware that any case of high authority has permitted a mere verbal agreement for the release of a covenant under seal, without an execution by the cancellation, or surrender, of the covenant itself, to operate as a discharge of the most solemn instrument known to the law: *Richard Godfrey's Case*, 11 Co. 43 a; *Alden v. Blague*, Cro. Jac. 99; *Preston v. Christmas*, 2 Wils. 86; *Kaye v. Waghorn*, 1 Taunt. 429; *Suydam v. Jones*, 10 Wend. 180 [25 Am. Dec. 552]; *Waggner v. Colvin*, 11 Id. 27; *Delacroix v. Buckley*, 13 Id. 71; *Phill. Ev.*, Cowen & Hill's notes, 1479. It is clear that sealed contracts for the performance of future acts would be of little avail if parol testimony could be received

to show that the parties verbally agreed, before the time of performance arrived, to dispense with the obligations of the covenant.

We advise a judgment for the plaintiff.

In this opinion HIKMAN, J., concurred.

Ellsworth, J., delivered a concurring opinion.

WHERE ONE PARTY IS NOT ABLE AND READY TO PERFORM his part of a contract, the other party may consider it at an end, when: See *Curtis v. Blair*, 59 Am. Dec. 257, note 263, where other cases are collected.

If PERFORMANCE OR CONDITION OF CONTRACT IS PREVENTED by one of the parties thereto, the other party is thereby excused from performance on his part: *Jones v. Walker*, 56 Am. Dec. 557, note 561, where other cases are collected. And one who is ready and offers to perform his part of the contract may maintain an action against the other party who refuses to perform his part: *Rankin v. Darnell*, 52 Id. 557, note 558, where other cases are collected. An offer to perform is performance, and when refused, answers to a claim for damages: *Commissioners of Kensington v. Wood*, 49 Id. 532. In *Armstrong v. Tait*, 42 Id. 656, it was decided that the readiness of a defendant to perform in an action for breach of a contract for the delivery of certain corn-shucks, and his offer to make delivery whenever the plaintiff would remove them, was a good defense, although at the time the offer was made part of the shucks were on the corn.

OFFER TO PERFORM OR DO ACT WHICH IS PREVENTED by the party in whose favor performance is to be made is equivalent to a performance: *Hunt v. Test*, 42 Am. Dec. 659, note 666, where other cases are collected. This case came again before the supreme court, and is reported in 26 Conn. 110.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
DELAWARE.

UNION CHURCH OF AFRICANS v. SANDERS.

[1 HOUISON, 100.]

WRIT OF ERROR LIES TO ORDER AWARDING PEREMPTORY MANDAMUS by the superior court, though not a judgment at common law, under the provision of the Delaware constitution conferring on the court of errors and appeals "jurisdiction to issue writs of error to the superior court, and to determine finally all matters in error in the judgment and proceedings of said superior court," which for this purpose places the judgment and proceedings of that court on original and on other than the common-law grounds, and therefore extends the jurisdiction of the court by writ of error to judgments or decisions in any proceedings in the superior court of a final character.

MANDAMUS WILL NOT LIE TO RESTORE MINISTER TO HIS CLERICAL RIGHTS AND FUNCTIONS where he has been wrongfully excluded therefrom by the trustees and congregation of the church, if he has no temporal right in such office, and there are no fees or emoluments attached thereto and dependent on its exercise, other than voluntary contributions.

MANDAMUS LIES FOR ENFORCEMENT OF LEGAL RIGHTS ONLY, and not for those of a purely equitable character, nor for those of a mere spiritual or ecclesiastical nature.

OFFICE OF MINISTER IS MERELY SPIRITUAL OR ECCLESIASTICAL OFFICE, where no temporal right, such as the enjoyment of an endowment or emolument, is attached thereto; and the wrongful exclusion from such an office does not involve any legal right of which a court of law can take jurisdiction. But if any temporal right is attached to the office and is affected by such exclusion, a legal right is involved; and if the law affords no specific remedy therefor, mandamus will lie to restore him to his office and its functions.

MANDAMUS to compel the defendant church and its trustees to admit the plaintiff, as elder minister, to preach in said church and to exercise a pastoral charge over the same, with all the

privileges and functions of elder minister of said church. The defendant, under certain articles of association, became a body politic, under an act enabling religious denominations to appoint trustees, who should be a body corporate, for the purpose of taking care of the temporalities of their respective congregations, and as such passed certain regulations or discipline whereby the plaintiff became the elder minister, in virtue of which he claimed to be entitled to preach and to exercise all other functions of such office. This the defendant refused to allow him to do, and he then brought this proceeding. An alternative *mandamus* was issued, which was subsequently made absolute. Defendant thereafter moved for leave to amend his return to the alternative writ, which was refused. At this stage of the proceedings a writ of error was sued out. Defendant then submitted a motion to quash the writ of error, on the ground that no writ of error will lie to an order granting a peremptory *mandamus* and refusing leave to amend the return to an alternative *mandamus*. The other facts necessary to an understanding of the case are stated in the opinion.

D. M. Bates, for the defendant in error.

J. Wales and William H. Rogers, for the plaintiff in error.

The court held that the writ of error would lie in the case, and refused the motion to quash it.

JOHNS, Chancellor. The court has come to this conclusion upon what it considers as a reasonable construction of the clause in the seventh section of the sixth article of the constitution, which provides that this court "shall have jurisdiction to issue writs of error to the superior court, and to determine finally all matters in error in the judgments and proceedings of said superior court," and which, for this purpose, places the judgments and proceedings of that court upon original and on other than the common-law grounds, and extends the jurisdiction of this court by writ of error to judgments or decisions in any proceedings in the superior court of a final character.

The case then proceeded on the writ of error and the record from below.

By Court, JOHNS, Chancellor. The preceding statement of the case, exhibited on the record, certified, and sent up, presents the questions which require our consideration and decision.

The first and most important is that of jurisdiction. For the purpose of ascertaining correctly whether the superior court had

authority to award the writ of peremptory *mandamus*, it is necessary to examine and understand the character of the injury complained of by the petitioner, and the remedy which he has sought to obtain. If no legal right has been violated, there can be no application of a legal remedy. The writ of *mandamus* is a legal remedy for a legal right. The petitioner states the injury to be the refusal of the trustees of the Union Church of Africans in Wilmington to admit him to preach in the said church whenever he may see proper so to do, and to administer the ordinances and discipline thereof, and to exercise a pastoral charge over the same, and asks the aid of the secular court by writ of *mandamus*. The party thus seeking the interposition of the civil power derives his office of elder minister and his authority to discharge its functions exclusively from the Methodist church, and alleges that, according to the discipline and usages of said church, it is his duty and right to preach in the said Union church in Wilmington whenever he may see proper so to do, and to administer the ordinances thereof, and to exercise a pastoral charge over the same. The right to the office and its functions are both expressly stated to be derived from ecclesiastical authority, and cannot under any aspect be viewed as temporal rights. The petition does not state the loss of any temporal right, or allege any loss of property consequential upon his being refused to admission to preach in said church or exercise the said spiritual functions.

It does not appear, from any allegation contained in the petition, that any temporal legal right has been infringed, or that the petitioner has been deprived of any ecclesiastical or temporal office. The only matter of complaint is that one of the religious societies over which his ecclesiastical authority, derived from the conference, existed, refused submission to its exercise. His office and functions over all the other societies remains unaffected; and no doubt the pecuniary compensation, derived from a common fund and incident to the office, remains unimpaired, for no loss or diminution is set forth. The present case, therefore, is only an application for admission to the exercise and discharge of ecclesiastical rights and duties in a particular church, exclusive of any and all temporal emoluments. It can only be regarded as asking the aid of a secular court to enforce obedience to the authority of the conference, a body exercising ecclesiastical and not a temporal power. If, then, I am correct in the view taken of the case made in the petition, the superior court has no jurisdiction, and erred in awarding the writ of *mandamus*.

But it has been supposed that the act of incorporation, in connection with the second section of the articles of association, sustains the jurisdiction of the court, and authorized the awarding of the writ. The answer to this is, that the petition, reciting and relying on the second section of the articles of association, made the whole thereof a part of the case, and rendered it incumbent on the court to consider and respect all the sections. The return to the alternative *mandamus* sets forth and relies upon the sixth article, which excludes all ministers from admission to preach in the said Union church unless with the assent of the trustees and a majority of the corporation; and further avers that no such consent was given, but refused.

The superior court, in awarding the writ of peremptory *mandamus*, were probably influenced by the English decisions, but after a full and thorough examination of them, I have not been able to discover a single instance in which relief was granted, unless some legal or temporal right was involved in the case. It is unnecessary here to review them; but it may be useful to advert to an important distinction which cannot be disregarded when our attention is directed to such precedents. I allude to the judicial jurisdiction in governments having an established church, whether constitutionally as a part of the organic law, or tolerated by law: in such it may be proper to regard the person entitled to the office as having a legal right; for although conferred ecclesiastically, it is held under and by virtue of constitutional or legal authority. In England the Episcopal church is a constituent part of the constitution, and has a legal existence. The ecclesiastical officers hold and are legally seised of the temporalities of the church, and need no act of incorporation for such purpose. The rector, being legally entitled to the church and glebe, when deprived or dispossessed may be restored by a writ of *mandamus*, which is a legal remedy for a legal right. The same jurisdiction has been exercised under the toleration acts, by analogy, in favor of dissenting churches having an endowment by deed, through the intervention of trustees; when the ecclesiastical office entitled the occupant or holder of the office discharging the services and duties thereof to temporal emoluments, for the purpose of protecting the temporal rights incident to the office, the secular courts granted the writ of *mandamus*. The decision in the case of *Rex v. Barker*, 3 Burr. 1265, sustains the view I have taken, as appears from the remarks of Mr. Justice Foster: "Here is a legal

right. Their ministers are tolerated and allowed; their right is established as a legal right, and as much as any other legal rights."

In all countries where the church is established by law, it may be consistent with public policy that it should be subject to civil jurisdiction; for when the law establishes or tolerates, a state of dependence is the legitimate consequence. In Scotland we lately had an illustration of the operation of this principle in their system of an established church. I refer to the celebrated Shathbogre case, which resulted in the formation of the Free Church of Scotland; adopting as its basis the voluntary principle, for the express purpose of being emancipated from the control of secular courts, derived from precedents consequent upon the connection of church and state.

But under our constitution, which declares that "no power shall or ought to be vested in or assumed by any magistrate, that shall in any case interfere with or in any manner control the rights of conscience in the free exercise of religious worship," it would seem a reasonable conclusion that all ecclesiastical offices and their functions must necessarily be excluded from the jurisdiction of the secular courts.

Regarding the whole ecclesiastical system under our constitution as based upon the voluntary principle, it can have neither legal capacity nor existence, and therefore incapable *sui juris* of having legal rights or temporal property; hence the necessity of obtaining acts of incorporation to create a corporate body, or constituting by deed trustees, for the purpose of acquiring and holding property for the use and benefit of churches; but the church, in its ecclesiastical order of functions and discipline, remains intact and free from the civil and secular jurisdiction.

It appears that *Runkel v. Winemiller*, 4 Har. & M. 448 [1 Am. Dec. 411], is a case in which the secular court exercised jurisdiction on the ground that the church was endowed, but decreed that emoluments which depend on voluntary contribution are not sufficient to warrant the court in issuing a *mandamus*. In *Towers v. Barrett*, 1 T. R. 183, lectureship not endowed, *mandamus* refused.

Instances have occurred in this country in which the trustees of Roman Catholic churches have refused to admit priests, although appointed and authorized by a Roman Catholic bishop, as was the case in the church of St. Louis, at Buffalo, and St. Mary's church in Philadelphia, and yet recourse was not had

to the civil authority; nor, as far as I am informed, was any attempt made to enforce the ecclesiastical authority by the writ of *mandamus*. That church, which in other countries has so long used the coercive action of secular courts, well knew that here it would be fruitless and unavailing. To obviate the embarrassment experienced from lay trustees, recourse was had to the legislative power; and in several of the states application was made for such acts of incorporation as would vest the temporalities of the church in the bishop, and thereby create an ecclesiastical corporation solely, having succession independent of the laity. Such was the mode of relief sought by the Roman church in our state, which was defeated by the passage of a resolution declaring them entitled, as they always have been, to the same rights and privileges as all other religious denominations. From the consideration I have given the subject, it appears to me that the petitioner failed to bring his case within the jurisdiction of the superior court. Being of that opinion, it renders it unnecessary for me to advert to the other questions involved; therefore I conclude the judgment of the superior court, ordering the peremptory *mandamus*, ought to be reversed and declared to be of no effect.

MILLIGAN, J. I concur in the opinion just announced by the chancellor, so far as relates to what I conceive to be the main question in the cause; namely, whether the writ of *mandamus* will lie in any case to restore a minister to his clerical rights and functions where there are no fees or emoluments attached to his office. With regard to the other causes of error that have been assigned, namely, the insufficiency of the return, and the re-hearing by the court, after the rule had been once discharged, I deem it unnecessary to consider them, as the ground first alluded to ought, in my judgment, to control the decision of the case; that is, that the writ of *mandamus* can only be resorted to for the enforcement of a legal right, and not for those of a purely ecclesiastical character. So far as I have looked into the authorities, both in England and this country, they fully sustain this position; and according to the affidavit of the relator, the present is precisely such a case. The facts show that Ellis Sanders, although a duly constituted preacher appointed by the yearly general conference, and accepted by the trustees and a majority of the congregation of the Union Church of Africans, under their rules of discipline to occupy their pulpit, was not entitled to receive any fixed stipend or salary for his services. Beyond the voluntary contribution of the religious society for which he

officiated as pastor, he was in the receipt of no pay, emolument, or compensation. If, then, he was debarred from the use of any right or privilege, it was simply of his right as elder minister to occupy the pulpit and preach to the congregation constituting the Union Church of Africans, and not of any legal or temporal rights. To restore him to his pastoral functions was the sole object sought to be attained by the application for this writ, which unadvisedly issued; and I am therefore in favor, upon the ground I have stated, of reversing the judgment of the court below.

HOUSTON, J. Concurring in the general conclusion already announced by the chancellor and Judge Milligan, I will take occasion to state at length, and more fully perhaps than may now be necessary, the grounds of my opinion.

The court below appears to have rested its decision of the case mainly, if not exclusively, on the ground of the insufficiency of the defendant's return to the alternative writ of *mandamus*. But the first question to be considered is the sufficiency of the case presented by the petitioner in his affidavit, to entitle him to the redress which he seeks through the instrumentality of this writ; for if the petitioner had no legal right, or in other words, no right which a court of law could recognize and enforce, to be admitted or restored to the place or office in question, then no writ of *mandamus* whatever should have been ordered in the case; and it therefore becomes, if such was the case, wholly immaterial here to consider whether the return was insufficient or not.

The petitioner's case, as stated in his application for the writ, is to this effect: that he is a duly constituted elder minister in the church in question, which extends, as he alleges, into several of the states of the Union; and that in virtue of his office as such elder minister, he is the pastor, or minister in charge, of a religious society, incorporated under the general law for such purposes, by the name of the Union Church of Africans in Wilmington in this state; and that as such it is his right to preach in the said church whenever he may see proper to do so, and to administer the ordinances and discipline thereof, and to exercise a pastoral charge over it. That the present corporate trustees of the church have forcibly excluded him from it, and have debarred and prevented him from exercising the rights and functions appertaining to his office; and that, having no other legal remedy in the premises, he prays the court to issue a writ of *mandamus*, directed to the said church, commanding them to

admit him to preach in the church whenever he may see proper to do so, and to exercise the rights before stated, or show cause to the contrary.

The statement of facts contained in his petition is full and particular, and he sets forth at much length such portions of the constitution, discipline, and usages of the church as he conceives to be necessary to establish the official character in which he appears before the court, and the ecclesiastical rights and privileges which he claims to pertain to it. But it contains no allegation, and there is no proof, that there is any emolument or compensation of any kind attached to the office of elder minister or preacher in charge of the church in question, or that there is any temporal right or benefit, stipend or salary, dependent upon or incident to it. On the contrary, it conclusively appears that the claim and right upon which he relies is purely spiritual and ecclesiastical in its nature, and that it involves no legal or temporal right whatever; and it is now well settled, both in this country and in England, that when such is the case *mandamus* will not lie. It was so held in the case of *Rex v. Bloer*, 2 Burr. 1043. In that case the application was to restore the party to the office of curate of the chapel of Calton. The chapel was endowed with lands, and the curate of it had a stipend. Lord Mansfield, in deciding the case, remarked: "This is a mere temporal question;" and afterwards added: "A *mandamus* to restore is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights, in all cases where the established course has not provided a specific remedy by another form of proceeding." "Here are lands," he also remarks, "annexed to this chapel, which belong to the chaplain in respect of his function;" and adds, by way of conclusion: "Where there is a temporal right, the court will assist by way of *mandamus*, because it is a specific remedy." The same principle was affirmed and the same distinction recognized in the subsequent case of *Rex v. Barker*, 3 Burr. 1265. The writ in this case was to restore a Protestant dissenting minister or preacher to the use of the pulpit of a meeting-house, which had been deeded in trust, together with a garden, to the use of a congregation and preacher; and Lord Mansfield held that the writ would lie for the same reason and in the same language adopted in the decision before cited, that "where there is a temporal right, the court will assist by *mandamus*." He speaks of the "endowment of the pastorship," and afterwards adds: "Here is a function with emoluments, and no specific legal remedy."

In the cases above cited, the writ was granted on the ground that there were temporal rights or emoluments connected with the function or office. I shall now cite a few cases in which the writ was refused because there were no such rights or emoluments appurtenant to the place.

The first of these to which I shall refer is the case of *Rex v. Bishop of London*, 1 Wils. 11. This was an application for a writ of *mandamus* to command the defendant to grant a license to the relator to preach as lecturer of the parish of St. Ann, Westminster. There were no emoluments or stipend of any kind connected with the office; and after taking time to consider of the case, the court discharged the rule, Lee, C. J., observing: "It appears that this parish has no fixed stipend for a lecturer, but merely depends upon the voluntary contributions of the inhabitants; nor does it appear that there is any certain custom as to electing a lecturer. Therefore, as there is no certain custom, nor does it appear that either of these persons (the claimants of the place) have the demand of one penny from any parishioner, or anybody whomsoever, but that the contribution to a lecturer is merely voluntary, the question is, whether this court will at all interpose in this matter; and we are of the opinion there is no foundation at all in this case to ground any right upon." The next is the case of *Rex v. Church-wardens of Croydon*, 5 T. R. 718; in this instance the application was for a writ to admit the party to the office of vestry clerk of the parish, but there were no fees or salary annexed to it, and Lord Kenyon, in discharging the rule, rests the decision on this ground, among others.

This principle of law has also been clearly recognized and ruled in this country. The case of *Runkel v. Winemiller*, 4 Harr. & M. 429 [1 Am. Dec. 411], is a leading authority on that point. There the object of the writ of *mandamus* was to restore Mr. Runkle to the place and function of minister of the congregation of a certain church in Fredericktown, and to the use of the pulpit thereof, with all the privileges and advantages appertaining to the place and function.

The affidavit alleged that he had been duly inducted into the possession of his function of minister of said church, and the emoluments thereto belonging, and that those emoluments consisted of the enjoyment of a parsonage-house, eighteen cords of wood annually, and an annual salary of eighty pounds of current money. The case was sustained by as able counsel as the bar of Maryland has produced, Luther Martin and William

Pinckney, and the court held, after full argument, that a writ of *mandamus* would lie. Chase, J., in deciding it, remarked: "The court are of the opinion that every endowed minister of any sect or denomination of Christians who has been wrongfully dispossessed of his pulpit is entitled to the writ of *mandamus* to be restored to his function and the temporal rights with which it is endowed." And again: "The office or function of minister must be endowed, or a *mandamus* to restore cannot be granted. Endowment does not necessarily mean that lands and tithes must be annexed to the living, in exclusion of any other means of support; but a stipend, rent, emoluments, and advantages of any kind given and secured to the minister during the time he shall officiate as minister, as a compensation for his services, is an endowment; the right to the function as the substance draws to it the emoluments as appertaining to it;" and concludes with this remark: "Here there is a function with emoluments, and unless the court interpose and grant a *mandamus* to restore him to his pulpit, and the use of the church, he will be without any specific remedy to recover the pulpit, and without remedy to recover the emoluments stipulated to be furnished; for the emoluments are annexed and appurtenant to the function, and unless he is restored to it, he will be without remedy to receive them."

Upon the authority of these cases, and the principle which they have so clearly established in regard to this writ, I am of the opinion that the court below erred in entertaining the application of Ellis Sanders for a writ of *mandamus* in this case. There is no endowment, no emolument alleged or shown to be annexed to the pastoral charge to which he claims to be entitled, and from which he complains that he has been and is still excluded by the trustees; and as there is no temporal or legal right shown to be involved in the matter, and as it appears that the only right which he asserts in regard to the office and functions claimed by him is merely an ecclesiastical or spiritual right, it is not a case for the interposition or within the jurisdiction of a court of law, and consequently it was not a case in which a writ of *mandamus* should have issued below. For it is not the province of a court of law to enforce such rights. A court of law cannot enforce a merely moral or a purely equitable right, much less a merely spiritual or ecclesiastical right. When, however, the possession or enjoyment of a temporal right, as the enjoyment of an endowment or an emolument, is attached to the ecclesiastical office and its functions, and is consequently dependent upon the exercise and enjoyment of the spiritual right, the law, out of the

regard which it entertains for the temporal right and benefit of which it has jurisdiction, will interpose by *mandamus* to restore the party wrongfully excluded from his ecclesiastical functions, where he has no other specific legal remedy for the temporal right, to prevent a failure of justice in this respect, which would otherwise occur. I would simply say, in addition to this, that I do not consider that the fact that the trustees of this church were incorporated under the general law to take charge of the temporalities of the church affects this principle of law as applicable to the case. I do not deem it necessary to refer to other questions which were raised and discussed in the argument, as the principal point, which I have already considered, disposes of the whole case. I am therefore of opinion that the proceedings of the court below in this case must be reversed.

HARRINGTON, C. J., dissented.

APPEAL OR WRIT OF ERROR LIES ON AWARD OF MANDAMUS, WHEN: See *Pinckney v. Henegan*, 49 Am. Dec. 592.

MANDAMUS LIES TO REINSTATE ENDOWED MINISTER to his function and temporal rights: See *Runkel v. Winemiller*, 1 Am. Dec. 411.

MANDAMUS LIES WHERE PARTY HAS SPECIFIC LEGAL RIGHT, and the law provides no other specific legal remedy: See *People v. Brooklyn*, 19 Am. Dec. 502, and cases cited in note 508; *King William Justices v. Munday*, 21 Id. 604.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

ALLEN v. HAWLEY.

[*6 FLORIDA, 142.*]

STEAMBOATS OWNED BY TWO OR MORE PARTIES ARE USUALLY HELD BY THEM AS TENANTS IN COMMON, and are therefore not ordinarily subject to the law of partnership; but where owned by parties who are copartners, doing a general partnership business, they are, without express agreement or circumstances showing the contrary, partnership property, and within the jurisdiction of the court of chancery in a suit by one partner against his copartner for an accounting, dissolution, and sale.

ORDER GRANTING INJUNCTION RESTRAINING DEFENDANT FROM COLLECTING DEBTS, making sales, etc., is proper in a suit for a dissolution and an accounting by one partner against his copartner, upon motion made, without notice, if the circumstances shown are such that the giving of notice might in all probability "accelerate the injury."

RECEIVER WILL BE APPOINTED BY COURT OF CHANCERY to settle up the affairs of a partnership whenever it is made to appear, by a bill filed by one partner, that there is a breach of duty or a violation of the agreement of partnership on the part of the others.

COURT OF CHANCERY HAS NO POWER TO APPOINT RECEIVER TO CARRY ON BUSINESS of a copartnership. Such power would not be intended by an order "to take charge of the steamer Quincy, to prevent injuries, * * * to repair said boat so as to put her in condition for sale, or such disposition of her as may be ordered by the parties, or as the court may order. The expense of repair and the like to be repaid by proper use of said boat."

ORDER OF SALE OF PARTNERSHIP PROPERTY upon a dissolution of the partnership will be made by a court of chancery where there is no provision for its disposition in the partnership agreement.

GRANTING OR CONTINUING OF INJUNCTIONS rests in the sound discretion of the court, to be governed by the nature of the case, and an injunction may be continued, although the answer, in terms, denies all the circumstances upon which the equity of the bill is founded.

EACH PARTNER HAS LIEN ON PROPERTY OF PARTNERSHIP for the amount of his interest in the partnership stock, and for advances made by him for the use of the firm.

BILL in equity by one Nelson Hawley against his copartner, Henry Allen, for a dissolution of the partnership, for the appointment of a receiver, for an injunction restraining Allen from interfering with the property of the firm, for an accounting, and for a sale of the property and division of the proceeds. Hawley and Allen entered into an agreement (which is set out in full in the opinion) to purchase, and did purchase, a steamboat to use in fulfilling a contract with the United States in carrying the mail for the period of four years, in which they were jointly interested, and also to be used in the transportation of freight and passengers, of which boat Allen was to be the manager; Hawley had advanced the sum of three thousand dollars to Allen for the purchase of the boat, the full cost of which was fourteen thousand six hundred dollars. The boat was used by Allen according to the terms of the agreement, he having the full control and management thereof, and also of the earnings; complainant was compelled to and did sue Allen for an accounting of his share of the boat soon after the purchase was made. A large sum of money was received by Allen as the result of the earnings of said boat. The term of the contract had expired, and complainant had demanded of Allen a settlement of their affairs. Allen, against the objection of complainant, moved the boat to the state of Georgia, where he left her, and where complainant was compelled to pay with his own funds a claim for which the boat had been seized under a writ of *fieri facias*. The court granted the injunction and appointed a receiver. An order was granted requiring a sale to be made of the boat and the proceeds to be distributed. The court, by an order, refused to dissolve the injunction and vacate the order appointing a receiver, from all of which orders this appeal is taken.

W. G. M. Davis and T. J. Eppes, for the appellant.

G. S. Hawkins, for the appellee.

By Court, DUPONT, J. The first point that arises in this cause, and upon the decision of which mainly depend many of the positions of law assumed by the counsel of the appellant, involves the inquiry as to the character of the tenure by which several individuals may hold title to merchant ships or steamboats; in other words, the relation which the several individuals hold to each other in respect to the ownership of that particular species of property.

All writers upon the subject of commercial and maritime law concur that, as a general rule, merchant vessels employed in navigating the ocean (and we have discovered no exception in respect to steamboats plying on the waters of the interior rivers and lakes) are held in tenancy in common, and not in joint tenancy, and thereby withdrawing that particular species of property from the operation of the law of partnership. In confirmation of this being the general rule on the subject, it is laid down in the books that "a ship is a chattel of which the owners are possessed as tenants in common; though if it be conveyed to them at one and the same time, and by one instrument, they are more properly joint tenants without benefits of survivorship:" Collyer on Part., Perkins' ed., sec. 1185.

Judge Story, in his treatise on the law of partnership, section 417, concurs in the doctrine thus: "Property in a ship," says this author, "may be acquired by two or more persons, either by building it at their own expense, or by the purchase of a part thereof of the sole owner, or by the joint purchase of the whole of another person; but whether acquired by a joint building, or a part purchase, or by a joint purchase, the parties, in the absence of all positive stipulations to the contrary, become entitled thereto as tenants in common, and not as joint tenants. In this respect it will make no difference whether the title is acquired at one and the same time, by and under one and the same instrument, or whether it is acquired at different times and under different instruments." And to the same effect are all the adjudications, both in England and in this country: *Dodington v. Hallet*, 1 Ves. sen. 497; *Ex parte Young*, 2 Ves. & Bea. 242; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Mumford v. Nicoll*, 20 Id. 611.

This, however, is to be taken as the enunciation of a general rule, and not as a universal principle, and, like all general rules, subject to exceptions. In this the authorities all agree. Collyer, in announcing the rule, limits it thus: "But a ship as well as other chattels may be held in strict partnership, with all the control in each partner incident to commercial partnership:" Collyer on Part., Perkins' ed., sec. 1186.

Judge Story qualifies the doctrine by stating it to be so "in the absence of all positive stipulations to the contrary:" Story on Part., sec. 417; and thereby tacitly admits that the general rule may be modified by the contract or agreement of the parties. Chancellor Kent also recognizes the exception, and with his usual clearness has stated the distinction between part ownership and

partnership in this species of property. He says: "The cases recognize the clear and settled distinction between part owners and partners. Partnership is but a tenancy in common, and a person who has only a part interest in a ship is generally a part owner, and not a joint tenant or partner. As part owner he has only a disposing power over his own interest in the ship, and he can convey no greater title, but there may be a partnership as well as co-tenancy in a vessel; and in that case one part owner, in the character of partner, may sell the whole vessel, and he has such an implied authority over the whole partnership effects as we have already seen. The vendee in a case free from fraud will have an indefeasible title to the whole ship. When a person is to be considered as a part owner, or as a partner in a ship, depends upon circumstances:" 3 Kent's Com., 4th ed., sec. 45, p. 154.

In *Harding v. Foxcroft*, 6 Greenl. 77, Mellen, O. J., said: "There may be a partnership as well as a co-tenancy in a vessel. When a person is to be considered as a part owner, and when as a partner in a ship, depends on circumstances. The former is the general relation between ship-owners, and the latter the exception, and it is required to be shown specially." In *Philip v. Purington*, 15 Me. 427, Shepley, J., remarks: "It is contended that they were not partners, but tenants in common of the vessel. Such is the usual relation of part owners, but they may become partners." In the case of *Lamb v. Durant*, 12 Mass. 54 [7 Am. Dec. 31], Parker, C. J., says: "Vessels owned by a copartnership are certainly effects of the partnership, and not unfrequently the principal effects. Occasions for selling them frequently arise in the course of business, and notwithstanding they are commonly conveyed by an instrument under seal, they may pass by delivery only, as well as any other chattel, so far as respects the property of the vessel. No exception from the authority of the partner relative to partnership effects can be found in favor of vessels; and there seems to be no reason for such exception."

Upon the authority of the decision in the case of *Ex parte Young*, 2 Ves. & Bea. 242, which was decided by Lord Eldon, and the effect of which decision, according to Mr. Collyer, was to overrule Lord Hardwicke's opinion in the case of *Dodington v. Hallet*, 1 Ves. sen. 497. Chancellor Kent decided the case of *Nicoll v. Mumford*, 4 Johns. Ch. 522. In delivering his opinion in that case he says, in allusion to the decision of Lord Hardwicke: "I dare not therefore follow a case which has never had effect, and has been so au-

thoritatively exploded. The cases which have been referred to are in point against the allowance of any partnership claim, or taking an account on the foot of any partnership in the vessel."

With all proper deference and respect for the opinions of Mr. Collyer and Chancellor Kent, the former of whom asserts that the decision of Lord Hardwicke had been "expressly overruled," and the latter that it had been "authoritatively exploded," we are inclined to think that the language used in respect to the effect of that decision is too strong. The language adopted by Lord Eldon in delivering his opinion in the case of *Ex parte Young*, *supra*, seems to us expressly to decline to overrule the case of *Dodington v. Hallet*, *supra*, for he says: "The difficulty in this case arises upon the decision of *Dodington v. Hallet*, by Lord Hardwicke, which is directly in point. That case is questioned by Mr. Abbot, who doubts what would be done with it at this day, and I adopt that doubt. The case which is given by Mr. Abbot from the Register's Book is a clear decision by Lord Hardwicke that part owners of ships, being tenants in common and not joint tenants, have a right, notwithstanding, to consider that as a chattel used in partnership, and liable as partnership effects to pay all debts whatever to which any of them are liable on account of the ship. His opinion went the length that tenants in common had a right to make a sale. There is great difficulty upon that case, and the inclination of my judgment is against it; but it would be a very strong act for me, by an order in bankruptcy from which there is no appeal, to reverse a decree made by Lord Hardwicke in a cause. From a manuscript, I know that it was his most solemn and deliberate opinion, after great consideration, that the contrary could not be maintained, and there is no decision in equity contradicting that." In the note of Lord Eldon's judgment in *Ex parte Harrison*, 2 Rose, 78, note, the language attributed to him is: "I certainly differ from Lord Hardwicke, but I hesitate to decide against his deliberate judgment in a cause, upon a petition in bankruptcy."

But whatever may be the effect to be given to Lord Eldon's opinion, it is very certain that Chancellor Kent, who based his decree in the case of *Nicoll v. Mumford*, 4 Johns. Ch. 522, upon that opinion, was reversed upon a review of that case in the court of errors of New York: *Mumford v. Nicoll*, 20 Johns. 611. It is not at all improbable that the apparent difference which seems to exist between Lord Hardwicke and Lord Eldon on this subject has grown out of a misapprehension of the extent to which the

former intended to be understood as having gone, in his decision of the case of *Dodington v. Hallet*, 1 Ves. sen. 497; that case might very well, from its circumstances, have been decided as it was, without in the least trenching upon the doctrine which recognizes the distinction between the rights of tenants in common and copartners. Spencer, C. J., in *Mumford v. Nicoll, supra*, says Lord Hardwicke perfectly understood the distinction between a tenancy in common, such as owners of different shares in a ship have among themselves, and a joint tenancy, as between partners of the goods and stocks in trade. He meant to decide, and did decide, that a subject which ordinarily may be held as a tenancy in common may, by the acts of the parties, become to be held in joint tenancy, and the fact of the agreement to build the ship at their joint expense, in proportion to their shares, and the agreement to fit her out, manage, and victual her for the service of the East India Company, formed, in his judgment, such a community of interest as to constitute that a partnership transaction in relation to those subjects, and thus a specific lien was acquired, etc. In the course of his opinion, Chief Justice Spencer further remarks: "I must not be supposed to overrule the distinction between partners in goods and merchandise and part owners of a ship. But I mean to say that part owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship; and if they are to be so regarded, the right of one to retain the proceeds until he is paid what he has advanced beyond his proportion is unquestionable."

The result of our investigations is, that as a general rule the several owners of a merchant vessel or steamboat hold their respective interests as tenants in common, and not as copartners, and consequently are to be governed by the rules of law applicable to that species of tenure; but that to this rule there may be exceptions, either growing out of the express agreement of the parties, or to be implied from the nature and character of the business or adventure in which they may be about to engage.

Applying the principle to the present case, and we are very clear in the opinion that the appellant and appellee, as part owners of the steamboat Quincy, held their respective shares in the same, not as tenants in common, but as copartners.

There is no evidence in the record of an express agreement between the parties that their respective interests in the boat were to be held in strict partnership, but originating, as these

interests did, out of a copartnership business, and being subservient thereto by the express terms of the agreement entered into between them in reference to that business, we do not see how it can be looked upon as an interest outside of that partnership. For a correct understanding of our views on this point, we give the written agreement alluded to, in *hac verba*, which may be found in the record, and noted as exhibit A:

"State of Florida, County of Franklin. This agreement, made and entered into between Henry Allen, of the state aforesaid, and Nelson Hawley, of the aforesaid state, and county of Gadsden, witnesseth: That the said Henry Allen and Nelson Hawley, being jointly interested in a contract with the United States for carrying the mail for four years, commencing on the first day of July next, upon the Appalachicola river, between the city of Appalachicola and Chattahooches on said river, known as route No. 3523, all in the aforesaid state; and in order to carry out the aforesaid contract, do agree that the said Henry Allen, on his part, is to furnish in cash the sum of three thousand dollars, and the said Nelson Hawley, on his part, is to furnish the like sum of three thousand dollars; and it is further understood and agreed that the said money, say six thousand dollars, is to be paid into the hands of the said Henry Allen, and he is to proceed at once to New Orleans, and, if necessary, up the Mississippi and Ohio rivers, for the purpose of purchasing a suitable steamboat to carry out the conditions of the said mail contract, using his judgment and means to the best advantage in making a selection and purchase of said boat; and if found upon examination to be for the benefit of the parties interested to pay more than six thousand dollars for the said boat, he, the said Allen, shall be authorized to give a joint note for the balance required, or secure the parties by lien upon the boat, as may be most expedient. All necessary expenses occurring in purchasing said boat to be shared equally by both the above-mentioned parties. And it is understood and agreed that Allen is to have command of said boat or boats, at a reasonable salary, say one hundred dollars per month, and to give his undivided attention to the interest of the contractors. And it is further agreed that Daniel Fry is to be employed in the capacity of engineer, to furnish his own second, at a salary of one hundred and thirty-five dollars per month as long as he faithfully discharges the duties in the above capacity to the satisfaction of the master of the boat. In witness whereof," etc.

It will be perceived by reference to this paper that the parties

had become "jointly interested in a contract with the United States for carrying the mail for four years" upon a certain mail route, and they mutually agree to furnish each a certain amount of cash for the purpose of purchasing a suitable steamboat "to carry out the conditions of the said mail contract." It is also evident from the terms of the recital in the written agreement that they were copartners in the strictest sense of the term, so far as the contract for carrying the mail was concerned, and we find it impossible, upon any sound principle, to view the steamboat to be purchased in any other light than as an instrument to carry out that contract, and a part of the stock in trade. The mail contract was the subject, the steamboat the mere incident, and therefore subservient thereto.

But should we be in error on this point, there is one other view of the subject that to our minds is unanswerable. It will be remembered that the cash contributed by the two parties in equal portions amounted to the sum of only six thousand dollars, and that the entire cost of the boat was about fifteen thousand dollars.

The excess of cost, as is made to appear by the record, was secured by a lien on the boat (in virtue of one of the stipulations of the contract), and the same was eventually paid off, and discharged from the net earnings of the boat. Now, in none of the authorities cited for the appellant is it for a moment doubted that although the vessel itself may be under the operation of the strict technicalities of a tenancy in common yet that the proceeds of the cargo or adventure is subject to the law of partnership. If this be so, then the case before us is one in which partnership funds have been invested in the purchase of a certain species of property; and it is only necessary to refer to the books to see the effect and operation of such a transaction. The discussions which have occurred in respect to the different rules which obtain in the respective cases of partnership and tenancy in common have grown out of the conflicting interests involved in the administration of real estate which had been purchased with the funds of the partnership. This subject was very ably discussed by Thompson, J., in the luminous opinion which he delivered in the case of *Loubat v. Nourse*, 5 Fla. 350, which was decided by this court at its term held in Marianna in 1853, and the conclusion at which the court arrived, after an elaborate and critical examination of the authorities both in this country and England, was, that "although such an estate be conveyed to the partners, so as to vest in them a legal estate as tenants in

common, yet in the absence of an express agreement, or circumstances showing an intent that the estate is to be held for the separate use of the partners, it will be considered in equity as vesting in the partners, in their partnership capacity, subject to an implied trust that they shall hold it until the purposes for which it was purchased have been accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts." This is an authoritative exposition of the law as it at present stands in this state; and if it be the law governing real estate, we can perceive no sound reason why it should not with greater force be applicable to every other species of property. The counsel for the appellant, in the supplemental brief furnished to the court, relied further upon the fact that the complainant Hawley in his bill alleges that he had previously been compelled to resort to a court of equity to compel Allen to make him a title to his share in the boat, and deduces therefrom the conclusion that the interests of the respective parties had thereby been severed. It is a sufficient reply to this argument to refer to the opinion in the case of *Loubat v. Nourse*, just cited, in which it is laid down that "although such estate be conveyed to the partners, so as to vest in them a legal estate as tenants in common, yet in the absence of an express agreement, or circumstances showing an intent that the estate is to be held for the separate use of the partners, it will be considered in equity as vesting in the partners," etc.

The case of *Fry v. Hawley*, 4 Fla. 258, has also been referred to as an authoritative adjudication of the point now under discussion. We have looked very carefully into that case, and think that the counsel has misapprehended the extent of that decision. The point now under consideration did not arise even incidentally, and it was therefore unnecessary that it should have been decided; nor do we find in the opinion even a *dictum* which would support the assumption of the counsel. In that case the court only decided that the transaction between Hawley and Fry did not raise a partnership between the three, Allen, Hawley, and Fry (there being no privity between Hawley and Fry), and left the question as to the relation existing between Allen and Hawley, growing out of the terms of the contract for carrying the mail, and the circumstances connected with the building of the boat, wholly untouched.

Having thus determined that the steamboat Quincy is to be considered as partnership property, and as such property within the jurisdiction of the court of chancery, it now only re-

mains for us to determine upon the propriety of the several interlocutory orders which have been entered in the progress of the suit now pending between the parties; and which, under the provision of the statute, have been appealed from by the defendant below.

The first order mentioned in the petition of appeal is the "order granting an injunction."

The bill of complaint filed in this cause purports to be by one partner against his copartner, and contains the usual prayer for account of the profits of the boat, and that she be sold, which is accompanied by the further prayer for the appointment of a receiver, and for the issuing of a writ of injunction "to restrain the said Allen from further possession or interference with said boat, or its proceeds, or from collecting any debts, dues, or demands due the same, or from selling or disposing of his said part of said boat." The bill appears to have been filed on the tenth day of September, 1851, and the writ of injunction, in accordance with the prayer, granted on the same day, but not executed until the eleventh day of February, 1852.

In Adams' Equity, p. 641, the law regulating the granting of an interlocutory injunction is thus stated: "The grants of the interlocutory injunction is discretionary with the court, and depends on the circumstances of each case, and on the degree in which the defendant or plaintiff would respectively be prejudiced by the grant or refusal." And again, at page 639: "An injunction is granted to restrain a defendant, so long as the litigation continues, from doing acts productive of permanent injury, or from proceeding in an action at law, where an equity is alleged against his legal right." On the same page, the author further remarks: "The ordinary mode of obtaining this injunction is by moving after notice to the defendant; but in particular cases, where giving notice might accelerate the mischief, it will be granted *ex parte* and without notice, *e. g.*, in cases of waste, or of negotiating a bill of exchange; and even where that special ground does not exist, yet if the act to be prohibited is such that delay is productive of serious damage, as in piracies of copyright and patent, an *ex parte* injunction may be obtained." Our statute provides that no writ of injunction or *ne exeat* shall be granted until a bill be filed praying for such writ, except in the special cases, and for the special causes in which such writs are authorized by the practice of the courts of the United States exercising equity jurisdiction; and no writ of injunction to stay proceedings at law shall issue, except on motion to the court or

judge, and reasonable notice of such motion, previously served on the opposite party or his attorney, etc.

The injunction in this case was granted on motion, and it does not appear that any notice of the application was given to the opposite party; and we think that the circumstances sworn to in the bill made it just one of those cases contemplated by the law in which the notice might be dispensed with, viz., where the very giving of the notice might in all probability "accelerate the injury."

It will be further noted that the peremptory requisition contained in the statute above cited is limited to applications "to stay proceedings at law," and in all other cases we presume that the practice of the high court of chancery of England will prevail where it does not conflict with the rules of court. Upon an examination of the record (for we had no argument from the counsel on this matter of the appeal), we do not find any error in the order granting the injunction, and do therefore affirm the same.

The second ground of appeal is from the "order appointing the receiver." The law in regard to the appointment of a receiver in suits between copartners is laid down thus by Adams in his work on equity: "The first step is that the partnership debts should be ascertained and the assets applied in their discharge. If the parties cannot agree on the intermediate management whilst the process of dissolution is going on, a receiver may be appointed to conduct it. But the court cannot permanently carry on the business, and will not, therefore, appoint a receiver, except with a view to getting in the effects and finally winding up the concern:" Adams' Eq. 437.

Collyer says: "Where a dissolution is intended, or has already taken place, a court of equity will appoint a receiver, provided there be some breach of the duty of a partner, or of the contract of partnership:" Collyer on Part., Perkins' ed., 354. In New York it is a matter of course to appoint a receiver, if the parties cannot agree among themselves as to the disposition and control of the property, upon a bill filed by one of the partners to close up the partnership concern: *Martin v. Van Schaick*, 4 Paige, 479; *Innes v. Lansing*, 7 Id. 583.

So a receiver will be appointed as a matter of course where either partner has a right to dissolve the partnership, and the articles of partnership do not provide for the settlement of the concern, upon a bill filed for that purpose: *Law v. Ford*, 2 Paige, 310; *Skip v. Harwood*, 2 Swanst. 586, note, a receiver was ap-

pointed of the brewery. It was ordered that it should be referred to the master to appoint a proper person to be a receiver of the stock, goods, etc., of the brewery trade, and the debts due the partnership; and in the mean time that the defendants be restrained from alienating, disposing of, or removing any of the utensils or dead stock belonging to the trade: Collyer on Part. 354, note 4.

A receiver was appointed of a steamboat where the owners disputed and required the court to settle their rights, and such receiver was required to run the boat. This was done for two years in the case of the steamboat Ontario, but in that case the court observed that it was highly inconvenient and unfit that such operations should be conducted under the direction of the court for so long a time; and an order for sale was accordingly made: *Crane v. Ford*, 1 Hopk. 114. In this latter sentiment of the court we fully concur. As it is not the province of the court to create a copartnership, so it is equally foreign from its functions to conduct its business. It never could have been contemplated that a court of chancery should become the superintendent of the private affairs of individuals: its legitimate province is to adjust the rights and settle the disagreements of parties growing out of such transactions.

From the examination which we have made of the authorities on this subject, we think the law may be considered as settled, that whenever the intervention of a court of equity becomes necessary, in consequence of dissensions or disagreements between the partners to effect a settlement and closing of the partnership concerns, upon bill filed by any of the partners showing either a breach of duty on the part of the other partners or a violation of the agreement of partnership, a receiver will be appointed as a matter of course.

The first three points made by the counsel for the appellant in his argument upon this branch of the case come clearly within and fully sustain the rule as thus laid down, and it is therefore unnecessary to notice them further than to remark that they receive our entire approbation.

But it was further contended by the counsel that the property having been taken possession of by the complainant, and being at the date of the application for the appointment of the receiver in his actual possession, it was absurd and contrary to all precedent that he should ask to have himself deprived of that possession. It is only necessary to advert to the facts of the case as they appear in the record to show that the application for the

appointment of the receiver is not obnoxious to the charge of inconsistency or impropriety. By the terms of the written agreement hereinbefore set forth, the right of the possession of the boat was guaranteed to Allen. By virtue of that right, he had taken the boat to Bainbridge, in the state of Georgia, as a safe place to lay her up during the summer. While there, and in the absence of Allen, who had gone on a visit to the north, as he says, for the benefit of his health, the boat was levied upon by virtue of a writ of *fieri facias* issued out of the inferior court of Early county, in the state of Georgia, and advertised for sale. For the purpose, therefore, of protecting the joint interest of the concern, Hawley, as one of the parties in interest, proceeded to Bainbridge, paid off the execution, and doubtless fearing a repetition of the same thing, took possession of the boat, and removed her out of the jurisdictional limits of the state of Georgia. In this whole transaction we see no evidence of any design or intention on the part of Hawley to assert any adversary right of possession to that acquired by and belonging to Allen, under the terms of the written agreement before referred to. We think it therefore unfair to assume that Hawley had the absolute possession of the boat at the time of the application for the appointment of the receiver. His possession was merely casual, and entirely subordinate to the right of Allen.

The next position assumed by the counsel was that a court of chancery has no power to appoint a receiver to carry on the business of a copartnership. In this we fully concur, as a general proposition of law, and to ascertain its applicability, it becomes necessary to examine the terms of the order granted in this cause.

The order is in the following words, to wit: "It is further ordered that Archibald T. Bennett be and he is hereby appointed receiver to take charge of the steamer Quincy, to prevent injuries from waste and decay and other casualties as far as may be practicable, to repair said boat so as to put her in condition for sale or such disposition of her as may be ordered by the parties, or as the court may order. The expense of repair and the like to be repaid by proper use of said boat." There is certainly nothing in the terms of the order from which it can be gathered that it ever was the design or intention of the court to invest the receiver with authority "to conduct the business of the partnership." The assumption, we presume, is based upon the last clause of the order, which directs that "the expense of repair and the like be repaid by proper use of said boat;" but we do not think even this clause, upon any fair principle of in-

terpretation, will bear such a construction. It was evidently the design of the order to relieve the copartners from the charge, by causing the boat to reimburse the outlay for repairs; and thus limited, it was altogether consistent with the strictest propriety. If the receiver has either exceeded or abused his authority as defined by the terms of the order making the appointment, and injury or damage has thereby accrued to any of the parties in interest, they have their remedy on his bond; but most certainly such transcending of his authority (if it has occurred) is not to be urged against the validity of the order.

The sixth, seventh, eighth, and ninth positions assumed by the counsel in his argument on this branch of the subject are already disposed of by the view which we have taken of the character of the title to this property, viz., that it is not a tenancy in common, but a strict partnership.

Applying, then, to the case, the rule which we have herein laid down in regard to the appointment of a receiver, and without going into an enumeration of the various charges set forth in the bill of the complaint, we are constrained to say that the case presented strongly demanded of the chancellor the interposition of his power to make the appointment.

The third ground of appeal mentioned in the appellant's petition is from "the order of sale of the boat Quincy." The entire argument of the appellant's counsel upon this branch of the case proceeded upon the assumption that the parties held their respective interests in the boat as tenants in common, and not as copartners. As before observed, any argument made upon this hypothesis, and the authorities cited in support thereof, becomes wholly inapplicable, from the decision which we have heretofore arrived at in considering the main question. There were no exceptions taken in the argument to the terms of the order. The only objection alleged in support of the appeal was as to the authority of the court to grant the order.

In Adams' Equity, p. 461, the law on this subject is thus laid down: "In order to effectuate the realization of assets, the payment of debts, and the distribution of surplus, the court has an authority over partnership estate which does not exist in other cases of common ownership, that of directing its sale and conversion into money. And this jurisdiction may be exercised, either by the same decree which directs a dissolution, or, if dissolution has already taken place, by an interlocutory order."

There are many cases in which a court of equity will assist the settlement of partnership accounts by decreeing in the first place

a sale of the property. Where no provision is made for the disposition of the partnership property upon a dissolution, this exertion of equitable jurisdiction seems to arise necessarily from that general principle that the retirement of one partner is the dissolution of the whole society: Collyer on Part., sec. 307.

"It appears, therefore, that in all cases of a partnership at will, whether the contract was originally of that nature or has become so by effluxion of time, or other circumstances, a court of equity will, upon a dissolution, decree a sale of the partnership effects at the desire of the parties:" Id., sec. 313. Upon a proposition so plain, however, we deem it unnecessary to multiply authorities, and conclude on this branch of the case by sustaining the propriety and validity of the order granted by the chancellor.

The fourth ground of appeal is from "the order refusing to dissolve the injunction and vacate the order appointing the receiver." The injunction in this cause was granted before answer, and the general rule of practice in such cases is to dissolve the injunction where the answer fully denies all the circumstances upon which the equity of the bill is founded: *Hoffman v. Livingston*, 1 Johns. Ch. 211; *Livingston v. Livingston*, 4 Paige Ch. 111; *Wakeman v. Gillepsy*, 5 Id. 112; *Cowles v. Carter*, 4 Ired. Eq. 105; *Gibson v. Tilton*, 1 Bland Ch. 355; *William v. Berry*, 3 Stew. & P. 284.

But there is no inflexible rule to this effect, for the granting or continuing of the injunctions must always rest in the sound discretion of the court, to be governed by the nature of the case. This doctrine has been fully recognized and authoritatively established by this court at its present term in the opinion delivered in the case of *Carter v. Bennett*, 6 Fla. 214; and is amply supported by the authorities therein cited. See also the following precedents: *Roberts v. Anderson*, 2 Johns. Ch. 204; *Poor v. Carleton*, 3 Sumn. 70; *Bank of Munroe v. Schermerhorn*, 1 Clarke, 303.

In the case before us, although the equity of the bill is denied by the answer in terms, yet it shows a state of circumstances which raises strong equities; and we think it would have been improper to have granted the motion for a dissolution of the injunction. And we are equally clear in the opinion that the motion to vacate the appointment of the receiver ought not to have been granted.

The fifth and last ground of appeal is from "the order for the distribution of the funds arising from the sale of the steamboat

Quincy." Upon this head the record affords but very meager information. There is nothing but the bare order setting forth the names of the several distributees, with the amount due to each, and as there was no objection made in the argument to the correctness of these claims, we are to consider them as admitted to that extent. We understand, however, the position of the counsel for the appellant to be this, that the debts having accrued through the action of the complainant in having repairs made upon the boat, he, and he alone, is responsible for such demands, and that they should not be charged upon the proceeds of the sale. To sustain this position, the counsel cited numerous authorities to the effect that one part owner is not liable for repairs put upon a ship against his will, but that the part owner ordering the repairs will be alone liable for the same.

The doctrine invoked by the counsel applies exclusively to cases where the owners hold as tenants in common, and not as copartners, and having already decided that the boat was partnership property, is not applicable in this case. The converse of that proposition, when applied to partnerships, is abundantly established by the authorities. It may be laid down as a general principle that each of the partners has a specific lien on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount for the use of the copartnership; and that the share of each is the proportion of the residue on the balance of account: Collyer on Part., Perkins' ed., secs. 125-127; Story on Part., secs. 360-441.

This disposes of the several grounds of appeal set forth in the appellant's petition of appeal, and it now remains for us only to remark briefly upon the general aspect of the case as presented by the record. It is quite apparent that the issue of this controversy has resulted most disastrously to the interests of both of the parties, causing, as it has, the total absorption or waste of the entire property. This result might and ought to have been avoided, if that spirit of amity and good faith which should always characterize the intimate and confidential relation of copartners had been properly observed. The hardship complained of by the appellant is the legitimate fruit of his own conduct. Had he acceded to the very reasonable proposal of the complainant to sell or purchase each other's interests, the whole business might have been speedily and amicably adjusted, and a resort to the interposition of the court been avoided. But this, according to his own showing, he obstinately refused, and manifested a fixed determination to oppose the interests of his copartner,

even at the sacrifice of his own. The event has resulted in the full consummation of that purpose, and if blame is to attach to any one, he must take it to himself.

The opinion of the court is that the appeal be overruled, with costs; that the several interlocutory orders appealed from do stand affirmed, and that the cause be remanded to the court below for such further proceedings, not inconsistent with this opinion, as may be appropriate.

PART OWNERS OF SHIP ARE TENANTS IN COMMON, and not joint tenants: *Knox v. Campbell*, 44 Am. Dec. 139; *Hopkins v. Forsyth*, 53 Id. 513, and note; *McLellan v. Cox*, 58 Id. 736.

PURCHASERS OF VESSEL ARE TENANTS IN COMMON where they are not partners in trade: *Milburn v. Guyther*, 50 Am. Dec. 681.

STEAMBOATS, LIABILITY OF PART OWNERS.—Persons who run a steamboat for their joint benefit are governed by the law applicable to particular partnerships, and are, therefore, not liable *in solido*, but each for his share: *Carroll v. Waters*, 13 Am. Dec. 316.

NO NOTICE TO DEFENDANTS OF APPLICATION FOR SPECIAL INJUNCTION OUGHT TO BE REQUIRED in cases where the injury may be immediate and destructive, and thus irreparable, or where the giving of the notice might precipitate the act sought to be enjoined: *Ex parte Martin*, 58 Am. Dec. 321.

WHEN INJUNCTION WILL BE DISSOLVED AFTER ANSWER: See *Yonge and Bryan v. McCormick, infra*, where cases on that subject are collected. Question of lien of part owner of vessel for advances considered at length, but the decision thereof held to be unnecessary: *McDonald v. Black*, 55 Am. Dec. 448, and note, where authorities are collected.

THE PRINCIPAL CASE IS CITED to the point that the granting or continuing of injunctions rests in the sound discretion of the court: *Sullivan v. Moreno*, 19 Fla. 222.

YONGE AND BRYAN v. McCORMICK.

[5 FLORIDA, 268.]

INJUNCTION—DEFECT OF TITLE TO PART OF REAL ESTATE SOLD, and inability of vendor, through insolvency, to respond to damages recoverable by vendee, are sufficient grounds for an injunction restraining the collection of promissory notes given for part of the purchase price.

IN APPLICATION FOR INJUNCTION AFTER ANSWER FILED, every matter in the bill which the defendant has failed to answer to, which he could have answered directly, is to be presumed against him; and the court will consider only those parts which are responsive to the bill.

ADJUDICATIONS AS TO MOTIONS TO DISSOLVE INJUNCTIONS ARE TO BE TAKEN AS AUTHORITY in cases of applications for injunctions after-answer, as no substantial difference is perceived to exist between them.

UPON CONSIDERING APPLICATION FOR INJUNCTION, COURT WILL NOT DECIDE points which will come up for consideration at the final hearing of the bill.

APPLICATION for injunction by Chandler C. Yonge and Henry Bryan against John McCormick. The facts are stated in the opinion.

McClellan, for the appellants.

A. H. Bush, for the appellee.

By Court, BALZELL, C. J. This is an appeal from a refusal of the court below to grant an injunction at the instance of the complainants, Yonge and Bryan. The application was after answer. The case made out by complainants is substantially as follows: That they bought from defendant a tract of land lying at the head of St. Andrew's bay, for a town site, hoping to realize from the sale of lots more than a sufficiency to reimburse the purchase money, and under representations by defendant that he had a *bona fide* and legal title to the land; that, influenced by these representations, they paid part of the purchase money, gave notes for the residue, and took a deed of general warranty. They state further, that on part of the notes they have been sued, and judgment recovered at law; that the title to lot No. 1, part of the tract containing forty acres, is defective; that its ownership was the main influence to the purchase, as without it they could not for a moment have entertained the proposition to buy, as this lot cuts them from the bay, and the remainder of the tract is valueless without it, and that defendant was aware of the title at the time of the sale; that defendant is insolvent and unable to respond to damages in case of recovery on the warranty, and they pray for a rescission of the contract, for an injunction, and for general relief.

Defendant, answering, admits the sale, receipt of the money, notes and existence of the judgment, denies that lot 1 cuts off the other part of the tract from the bay, but asserts that such other part extends to the bay; alleges that the title to lot No. 1 is in his wife, to whom he furnished the money for entering it, and has never been reimbursed, and that the lot actually belongs to him, and his wife should be held as his trustee as to this land; that he apprised complainants at the time of making the deed of the state of the title, of the entry being in the name of his wife, but that he paid for it, and in fact that he handed to one of the complainants the certificates therefor, and furnished them with all the facts connected with the transaction; that complainants have committed and permitted waste, so that it would be wrong to force him to take back the land; that their possession has not been disturbed, and that they are sufficiently protected by their warranty.

The defectiveness of title to part of the property, and the inability of defendant, through insolvency, to compensate the deficiency, are the grounds of equity set forth by complainants, and are sufficient of themselves to entitle them to the injunction. Without committing ourselves to a point only considered for the purpose of this preliminary proceeding, it is sufficient to refer to the authorities cited by complainant's counsel, and more particularly to the doctrine of the courts of Virginia. It is there well settled that "equity will enjoin the collection of the purchase money of land, on the ground of defect of title, after the vendee has taken possession under a conveyance from the vendor, with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly that the title is defective:" *Keyton v. Crawford*, 5 Leigh, 89; *Koger v. Kane*, Id. 606; 2 U. S. Eq. Dig. 654.

The equity of the bill has not been seriously questioned, but it has been urged that the answer avoids it, and shows a state of facts which removes the equity set up, and the answer has been treated in the argument as if entitled to the same credit as if the case were submitted for final hearing. The answer, we have seen, admits the defects of title, and evades the allegation of insolvency.

As to the mode of considering the answer, it is sufficient to refer to the adjudications, which are to this effect: "On a motion to dissolve, everything is to be presumed against defendant in respect of every matter to which he could answer directly, and has not answered. The court will look to such facts of the answer only as are responsive to the bill:" *Moore v. Ferrell*, 1 Ga. 7; *Jones v. Lemly*, 2 Ired. Eq. 278; *Dalrymple v. Sheppard*, 3 Id. 74; *Parks v. Spurgin*, 3 Id. 153; 1 *Eden on Inj.*, Waterman's ed., 146.

"On the hearing of such motion defendant is the actor, and although the contents of his answer are generally to be taken as true, it must fully answer the plaintiff's equity. There must be no evasion, no disposition to pass over the material allegations of the bill, and if a reasonable doubt exists in the minds of the court whether the equity of the bill is not sufficiently answered, the injunction will not be dissolved:" *Miller v. Washburn*, 3 Ired. Eq. 161.

"When the equity of the bill is not denied by the answer, but a new equity is thereby introduced to repel or avoid it, the injunction will not be dissolved, but continued to the hearing:" *Lyrely v. Wheeler*, 3 Ired. Eq. 170.

These are adjudications as to the motion to dissolve; but it is not perceived that substantial difference exists between it and the case of a motion or application for an injunction after answer.

The order refusing the injunction will be reversed and set aside, and the case remanded to the court below, with directions to grant the injunction as prayed for, and for further proceedings not inconsistent with this opinion.

COURT OF EQUITY WILL RESTRAIN GRANTOR FROM COLLECTING WHOLE AMOUNT OF PURCHASE MONEY, if covenants have been broken, and he is insolvent: *Woodruff v. Bunce*, 38 Am. Dec. 559, and note; but otherwise if judicial sale: *Threlkelds v. Campbell*, 44 Id. 384. Insolvency of vendor: *Lyon v. Hunt*, 46 Id. 216.

INJUNCTION TO PREVENT COLLECTION OF PURCHASE PRICE OF REAL ESTATE will not be sustained where title of purchaser is neither threatened by suit nor clearly shown to be defective: *Ralston v. Miller*, 15 Am. Dec. 704.

DISSOLUTION OF INJUNCTION NOT AUTHORIZED BY MERE DENIAL on information and belief where injunction is sustained by the allegations in the bill: *Attorney General v. Cohoes Co.*, 29 Am. Dec. 755.

INJUNCTION WILL NOT BE DISSOLVED UNLESS ANSWER FULL AND SATISFACTORY: *Scull v. Reeves*, 29 Am. Dec. 694; or if only states matter of opinion: *Catlin v. Valentine*, 38 Id. 567. Allegations in answer on motion to dissolve injunction taken only so far as responsive to bill: *Hardy v. Summers*, 32 Id. 167; *Allen v. Hawley*, ante, p. 198; but if answer denies the facts upon which plaintiff's equity rests, the injunction must be dissolved: *Gibson v. Tilton*, 17 Am. Dec. 306.

THE PRINCIPAL CASE IS CITED in *City of Appalachicola v. Appalachicola Land Company*, 9 Fla. 348, to the point that the court will not commit itself as to a question which may arise at the final hearing upon application for injunction; also *Linton v. Denham and Walker*, 6 Id. 542; also in the latter case to the point that the court, in an application for injunction after answer, will only consider those parts of the answer which are responsive to the bill.

SANDERSON v. JONES.

[6 FLORIDA, 490.]

SEPARATE ESTATE IS NOT CREATED TO WIFE in a marriage settlement executed by herself and husband in trust, by the words "to the use, benefit, and behoof of himself and wife."

TO CREATE SEPARATE ESTATE, MORE STRINGENT EXPRESSIONS would seem to be required by later authorities than formerly.

ALL OF PROFITS AND INCOME OF TRUST ESTATE settled jointly upon husband and wife belong to the husband as a compensation for his liability to support the wife.

HUSBAND HAS POWER TO ALIENATE HIS LIFE INTEREST in property settled jointly upon himself and wife for life, remainder to their children, where

the possession has been delivered to him by the trustee. The children would have their remedy against the purchaser by bill *qui resumere possint* when their interest matured.

BILL in equity by Elizabeth S. L. Jones as trustee, Mary M. E. Harrison, wife of Robert Harrison, sen., and the children of the two latter, against John P. Sanderson and Robert Harrison, sen., for the possession of certain slaves. Robert Harrison, sen., and Mary M. E. Cooper, in 1813, before their marriage, executed a deed of marriage settlement conveying certain slaves, property of Robert Harrison, sen., in trust "to the use, benefit, and behoof of himself and his wife for and during their natural lives, and after the determination of that estate, in trust for the use, benefit, and behoof of the child or children of them, the said Harrison and wife, share and share alike, to them, their heirs and assigns forever." A daughter of the marriage, Mary, married John Sanderson, and her father, Robert Harrison, sen., in 1844, conveyed eleven slaves, two of whom were conveyed by the deed of 1813, and the balance descendants from those conveyed by that deed, in trust for the use of said daughter, which daughter died without issue, and her husband, John Sanderson, obtained a decree for and took possession of said slaves by virtue of the conveyance to his wife. Elizabeth S. L. Jones, one of the complainants, is executrix of Joseph Jones, the last surviving trustee of the deed of 1813. A demurrer was filed to the bill by Sanderson, and overruled, and Sanderson appealed. The questions raised by the demurrer are sufficiently stated in the opinion as each is decided.

G. W. Call, jun., for the appellant.

Philip Fraser and C. P. Cooper, for the appellees.

By Court, BALTZELL, C. J. This case depends upon the power of a husband, under a marriage settlement, to convey an interest in certain slaves, part of the property settled. Robert Harrison, sen., previous to his intermarriage with his present wife, then Miss Mary M. Cooper, in connection with his intended wife, conveyed to trustees a large number of slaves, his own property, and also other property of hers, "in trust to the use and behoof of himself and his wife for and during their natural lives, and after the determination of that estate, in trust for the use, benefit, and behoof of the child or children of them, the said Harrison and wife, share and share alike, to them, their heirs and assigns forever." This was dated June 9, 1813.

After the intermarriage of his daughter Mary with John Sanderson, he conveyed, on the fourth of January, 1844, eleven negroes to a trustee for the only proper use, benefit, and behoof of his said daughter. Mrs. Sanderson having died, her husband filed his bill asserting title to the property under the conveyance aforesaid, and by virtue of his marital rights, against Robert Harrison, sen., and the trustee of his wife, and after hearing and argument of counsel, a decree was rendered by the circuit court of Duval county "that Robert Harrison, sen., is not heir or distributee of the said Mary Sanderson, and has no right, title, or interest in and to the estate of the said Mary Sanderson, in remainder, reversion, or otherwise, and that the complainant Sanderson is entitled to the possession of said slaves," and an order was passed for their delivery to him by said Harrison.

The present bill is filed by Mrs. Harrison, wife of Robert Harrison, through the executor of the surviving trustee, and by her other children, claiming that the conveyance to Mrs. Sanderson was invalid, and carried no interest to her, nor to her husband Sanderson. This, of course, involves an inquiry into the marriage settlement between Harrison and his wife, and the nature and extent of the interest of the parties to it. It has been assumed that a separate estate is created by it for Mrs. Harrison, which we think by no means clear. The property is not settled to her sole or separate use; the words are, "to the use, benefit, and behoof of himself and wife." Undoubtedly such words, applied to the wife, will not create a separate estate. Can the addition of the husband and the connection of his name make a difference?

The books are not silent as to this subject. In an elaborate opinion delivered by Saffold, C. J., of Alabama, the supreme court of that state say: "The property [slave] is declared to be for the joint use and support of husband and wife, and subject to their joint possession. Was any case cited in argument, where, by construction, so much violence was done to the language of the deed as to maintain that a clause expressly creating an estate for the joint use and support of two was intended to create a separate property for the sole use of one?" Clancy, Husband and Wife, 269, after a very learned investigation of the whole subject and a review of the cases, says: "All these cases clearly prove that there must be a manifest intention evinced by the language of the donor that the wife shall have the exclusive property in the gift, without which courts of

equity will not suffer the legal rights of the husband to be superseded." They then say: "They come to the conclusion that this gift cannot inure to the separate use of the wife and child, or either, and that the marital rights of the husband have not been excluded." *Harkins v. Coalter*, 2 Port. 473; see also *Wardle v. Claxton*, 9 Sim. 525; S. C., 17 Eng. Ch. 225.

A reference is given in a note to Hill's work on trusts, page 420, note by Wharton, to *Bender v. Reynolds*, 12 Ala. 446, and *Geyer v. Branch Bank*, 21 Id. 414, but we have not been able to procure them: *Ashcraft v. Little*, 4 Ired. Eq. 241.

It may be proper to remark that more stringent expressions would seem to be required by the later authorities to create a separate estate than once were considered sufficient: Hill on Trusts, by Wharton, 611.

Even if the wife have a separate estate, the inquiry arises as to the interest of the husband, Robert Harrison, in the property conveyed, and the broad ground has been assumed that he had none that he could convey. It is very clear that he has an interest if she has one, and if he has none, she is in the same condition. The authorities as to the relative rights of the two parties will be found to be as follows: "Where property belonging to the husband, and of which he is the purchaser, by settlement is vested in trustees in trust to pay the income to the husband and wife jointly during their joint lives, the husband alone will be entitled to receive the whole income." Hill on Trusts, 427; *Duncan v. Campbell*, 12 Sim. 616. "A husband, in equity as well as at law, is entitled to the receipt of the income of his wife's property as a compensation for his liability to maintain her." Hill on Trusts, 410, note; *Carter v. Anderson*, 3 Sim. 370; 1 Roper on Husband and Wife, 273. "Consequently he will be entitled to the uncontrolled beneficial enjoyment of her life interest unless he deserts her." Hill on Trusts, 410. In *James v. Mayrant*, 4 Desau. 602 [6 Am. Dec. 630], the court of appeals of South Carolina say: "It was decided in *Barret v. Barret*, 4 Desau. 448, that the husband supporting the expenses of the household was entitled to the whole of the profits of the trust estate settled jointly on the husband and his wife. Under such a settlement, the creditors of the wife would not be allowed to deprive the wife of her maintenance." In the case of *Nepier v. Wightman*, 1 Speers Eq. 369, the same court say: "This settlement provides that the defendant, William J., and his wife shall have the whole of this estate, slaves, etc., during their joint lives, without assigning any part to her separate use; and if it be

true—and that will not be controverted—that all the chattel interests of the wife belong to the husband, he is entitled to the whole income of this estate so long as they both live, and if arrested on a *ca. sa.* from a court of law, would be required to assign." The terms of the deed were to trustees in trust for the joint use of husband and wife during their joint lives, then to the use of survivor during life, etc. The same court says further, in the same case: "I shall not stop here to inquire whether under the statutes of uses the defendant Wightman has not a vested interest in the whole of the real estate during life. It is very clear that under the provision in the settlement he is entitled to the income of the whole estate, real and personal, for the joint lives of himself and wife, and during his life, if he survives, with power of disposition as to one half absolutely:" Id. 370.

Whilst, then, we have seen that Harrison had an interest in the trust estate, the question yet arises as to his power to convey, which also has been earnestly and seriously denied and questioned. In the case of *Shomo v. Bobe*, reported as *Maiben v. Bobe*, 6 Fla. 381, decided at the present term, we had occasion to express our views on the subject of alienation in general, and we desire to refer to them in connection with this case. On this subject, before referring to authorities more directly in point, it may be well to refer to the general law as well as to the reasons for its existence. "A conveyance to B., in trust or for the use of C., or where only the equitable title passes, as in case of a conveyance to B. to the use of C. in trust for D. The trust in this last case is executed in D., though he has not the legal estate:" 4 Kent's Com. 305. Our own legislature, in the law passed to secure the rights of married women, gives the right of disposal to the man and wife. We will add that in speaking of the power of alienation Blackstone says: "We must consider rather the incapacity than capacity of the several parties, for all persons in possession are *prima facie* capable of conveying and purchasing, unless the law has laid them under peculiar disabilities," etc., and among these he enumerates persons attainted of treason, idiots, etc.: 2 Bla. Com. 290.

Whilst such is the general rule, we shall find no diversity as to the particular subject of inquiry: "A perpetuity will no more be tolerated when it is covered with a trust than when it displays itself undisguised in a settlement of the legal estate:" 1 Lewin on Trusts, 138. "It is absolutely against the constant course of chancery to decree a perpetuity, or give any relief in that case:" 1 Ch. Pl. 144; 5 Jac. Law Dict. 143.

Blackstone in his Commentaries, speaking of the changes made by courts of equity in the doctrine of uses, says: "They have raised a new system of national jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses without their inconvenience and frauds. The trust will descend, may be alienable, is liable to debts, to executions on judgments, etc.:” 2 Bla. Com. 337.

"The *prima facie* rule of trusts is that the intention of the settler shall be carried into effect, but the intention cannot be pursued when it contravenes the public policy of the law." "So trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be aliened, or shall not be subject to the claims of creditors. If it can only be ascertained that the *cestui que trust* was intended to take a vested interest, the mode in which or the time when the *cestui que trust* was to reap the benefit is perfectly immaterial; the entire interest may either be disposed of by the act of the *cestui que trust*, or may become vested in his assignees by operation of law:" Lewin on Trusts, 137, 138; *Snowdon v. Dales*, 6 Sim. 524; *Green v. Spicer*, 1 Russ. & M. 395; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429. In one of these cases the lord chancellor says: "There is no doubt, generally speaking, that if property is given to a man for his life, the donor cannot take away the incident to a life estate. Equity, making a *feme* the owner of it, and enabling her as a married woman to alien, might limit her power over it, but the case of a disposition to a man, who if he has the property has the power of aliening, is quite different:" *Wardle v. Claxton*, 9 Sim. 525.

"A trust is assignable. An equitable interest may be assigned, though it be a mere possibility, and either with or without the intervention of the trustee; and the assignee of the *cestui que trust* may call upon the trustee to convey to him, and on his refusal may file a bill to compel a conveyance without making the assignor a party:" Lewin on Trusts, 499; *Brydges v. Brydges*, 3 Ves. jun. 127; *Goodson v. Ellisson*, 3 Russ. 583. In *Lady Arundel v. Phipps*, 10 Ves. 140-148, which was a settlement to the use of Lord and Lady Arundel for their lives and the life of the survivor, Lady Arundel became equitable owner of goods and chattels, and she became so under a contract of purchase which she insisted she was entitled to make with her husband himself, and her purchase was sustained against the creditors of the husband.

In *Ford v. Caldwell*, 3 Hill (S. C.), 249, the deed conveyed to the joint use of husband and wife for life, not subject to their

debts, and after the death of either to the use of the survivor for life, and after the death of the survivor to the use of the children of the marriage. Speaking of this state of facts, the supreme court of South Carolina, Judge O'Neill pronouncing the opinion of the court, says: "I hold the trust was executed in the husband, at least for his life. For according to the deed, he was entitled to the possession of the slaves; having this, he had both the legal and equitable estate for his life. For the trustee had nothing to do with it during this time; he had delivered the slaves to one who was under no legal disabilities; this was equivalent to a conveyance to him for the time he was to possess it. For the condition annexed to the trust, not to be subject to the debts or contracts of the husband and wife, is void. The husband, having both the legal and equitable estate, could transfer it, which he did to Chur." The general property was in Ford, trustee, but he had parted with the right to possess it to the *cestuis que trust*, Swift and wife, for life. At law, the wife's being and rights are merged in the husband, and hence his possession for the joint use of himself and wife for life made the property for that time his entire qualified legal estate." This was a suit at law, instituted by trustee against the purchaser.

In *Ioor v. Hodges*, 1 Speers Eq. 596, which was to a trustee for husband and wife, the same court quote the same case as follows: "In personal estate the legal estate remains in the trustee until he executes the trust by delivering the possession to one capable of holding in himself a legal estate in the property to the extent of the interest intended to be conferred by the deed. In this case the trustee had nothing to do with the property during the life of the husband. He had delivered the slave to one who was under no legal disability. This was equivalent to a conveyance to him for the time he was to possess it."

An idea prevails that though the income and profits may be assigned, yet the body, the *corpus* of the estate, may not be. If this be the case, we have not perceived it in the general rule stated nor in the particular cases cited.

There is another aspect of the case worthy of consideration. Suppose a decree made in favor of Mrs. Harrison, as contended for, and the property restored, who would take the possession? who be entitled to the income during the life of Harrison? The answer is not a difficult one: the husband, Harrison himself, and no other person; so that the suit may be regarded, and properly cannot be regarded in any other light than as one instituted by him and for his benefit against his own assignee.

Were these authorities less clear and satisfactory than they seem to us to be, we yet think the decree in favor of Sanderson against Harrison conclusive as far as his possession of the property, his interest in it, and his power of alienation are concerned. It was the decision of a court of competent jurisdiction as to these issues on the subject itself, and whether erroneous or not, it constitutes the law of the case. We shall not undertake to say that this decision is conclusive on Mrs. Harrison in every possible aspect of the case. It is sufficient that the facts presented by the record do not remove such conclusion. As far as the facts of this case are concerned, we have possession by the husband of the trust property, for near forty years to the present time, thirty years prior to the transfer to Mrs. Sanderson, with receipt by him of the income, profits, etc., without interference by the trustees, alienation by the father and husband so possessed to his daughter, possession by the latter, and the right of her husband, confirmed and established by decree of the court.

As far as the law is concerned, we find Robert Harrison, the husband, rightly entitled to the possession of the property, to the income and profits arising from it, that he had a right to sell to the extent of his interest, and his assignee to hold it.

We have not referred to the fact that the assignment to Mrs. Sanderson does not conflict with the main design of the deed of trust, but is merely in advance of it. The children of the marriage are expressly provided for in the settlement. Nor is the case altered by the fact that by the dispensation of Providence, the husband, rather than the wife, is before us claiming the benefit of the last settlement. He has been decided to be entitled to her rights and interests, and is entitled to the same favorable consideration that she would be if contending for the property herself.

It remains to dispose of the case as far as the children of Mrs. Harrison are concerned, who claim the remaining interest after the termination of the life estate. The question of their interest can only be before us for one purpose, and that is for the protection of the property, so that they may assert their interest when it comes into existence. This they may be entitled to obtain from the court, on a proper showing by a bill *quia timet*. If the property is in danger of being diverted and squandered, and they have the interest contended for as against Sanderson, they may obtain relief from the court: 1 Story's Eq. Jur., sec. 827; *Osborne v. Van Horn*, 2 Fla. 361.

We have not considered whether, if Robert Harrison, by any casualty, should become unable to support his wife, she might not have a right to call upon Sanderson to contribute to the extent of his interest. Such case has not been presented by the proof nor the pleadings, nor have we thought proper to determine the question of her right in the event of his death and her surviving. These questions will be appropriately decided when properly presented.

The decree of the circuit court overruling the demurrer will be reversed and set aside, and the case remanded with directions to dismiss the bill of complaint and dissolve the injunction without prejudice to other rights and interests than those now determined.

DUPONT, J., delivered a dissenting opinion.

IN THE PRINCIPAL CASE, Dupont, J., delivered a dissenting opinion at length, holding that the words "to the use, benefit, and behoof of himself and wife" created a separate estate to the wife, the intention of the deed being to exclude the marital rights of the husband since coming from him; but he says that, ordinarily, such words would not create a separate estate; that he agrees with the opinion of the court that the husband is entitled to the income and profits of a joint estate settled upon both husband and wife, but such interest does not extend to the *corpus* of the estate. The opinion is quite able, and cites numerous authorities to sustain his views, and treats of all the points decided or commented upon by the court in its opinion, of which it is not necessary to note here further than the above.

WORDS WHICH WILL CREATE SEPARATE ESTATE: See note to *Smith v. Wells*, 39 Am. Dec. 773, where the subject is discussed and authorities collected.

RENTS, ISSUES, AND PROFITS OF WIFE'S REALTY BELONG TO HUSBAND: *Bowie v. Stonestreet*, 61 Am. Dec. 318; *Burleigh v. Coffin*, 53 Id. 226.

AM. DEC. VOL. LXIII—15

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

CREAMER & GRAHAM v. SHANNON.

[17 GEORGIA, 65.]

COPY OF ITEMS OF ACCOUNT MADE FROM MERCHANT'S ACCOUNT-BOOK and sworn to by him are inadmissible as evidence to establish such account in an action for goods sold and delivered, although the books themselves have been burned.

The opinion states the facts.

Tucker and Beall, for the plaintiff in error.

Hawkins, for the defendant in error.

By Court, LUMPKIN, J. The plaintiffs in error in this case brought suit as merchants against the defendant, on an open account, for goods sold and delivered to him during the year 1853. Upon the trial it was proposed to show by Mr. Creamer, one of the firm, that the bill of particulars filed with the complaint was a true transcript from the book of original entries; that said entries were made by himself, the partners having no clerk, and that the book containing these entries had been burned in the late fire at Americus. The circuit court refused to allow the account to be established in this way; and that judgment is excepted to.

This court, in one of its earliest decisions, held that the accounts of shop-keepers might be proved by themselves, where the books of original entries kept by them were produced, appeared to be fair upon their face, and the items were regularly charged, there being nothing upon the face of the books themselves to discredit them. This practice has obtained throughout the state; and

indeed, I might say throughout the United States. And Mr. Greenleaf does not seem to consider it at variance with the principles of the common law. But it has always been conceded that even the original books kept by the party himself and proved by his own oath should be viewed suspiciously and scrutinized closely, and at best are only allowed from the necessity of the case, as a part of the *res gestae*.

But this case proposes to go one step farther, and to permit the party to introduce in evidence a transcript of the account from the books. We are unwilling to go this far. It takes from the defendant the last and only check upon this very loose species of proof. So long as the books themselves are required to be produced, the defendant may by their inspection detect such proofs of a want of fairness and regularity as to cast suspicion or discredit upon the account with which he is sought to be charged. But allow the party, in the absence of his books, to establish the demand by a copy claimed to have been drawn or transcribed by himself, and what protection has the defendant? Is he not delivered over, bound hand and foot, to his adversary? Better that the debt be lost for want of sufficient testimony, as many rights are, than to establish a principle and practice so fraught with mischief.

But it is not true that the plaintiffs have no other mode by which they can establish their debt. Under the late statute they could make the defendant a witness and compel him to testify. This account contains but seven items; some of them leading ones, such as a pair of boots, etc. Is it not likely that the defendant would recollect these and admit their justice?

ACCOUNT-BOOKS AS EVIDENCE.—See extensive discussion of this question in note to *Union Bank v. Knapp*, 15 Am. Dec. 181. See also *Hunt v. Roylance*, 59 Id. 140; and *Thomson v. Porter*, 53 Id. 653, and note collecting prior cases. The principal case is cited in *Crawford v. Stetson*, 51 Ga. 120, where the court decide that, in a suit upon an unliquidated account, where the plaintiff stated in his answer to interrogatories taken out in his own favor, to which was attached a copy of the account sued on, as follows: "We did keep a regular set of books in the years 1867 and 1868, and the account is correct," it is not a sufficient proof of the account; that the answer being plainly based upon the books, they should have been produced and proved in the usual way. It is also cited in *Petit v. Teal*, 57 Id. 145, where the same principle is recognized.

VEASEY v. GRAHAM.

[17 GEORGIA, 99.]

DEED FROM BANK IS PRIMA FACIE GOOD when signed by the president and countersigned by the cashier.

DEED FROM PRESIDENT OF BANK TO HIMSELF IS NOT ABSOLUTE NULLITY, although the law looks with great suspicion upon such transactions. It is at least admissible as color of title.

WHERE PRESIDENT OF BANK MAKES DEED TO HIMSELF, IN ORDER TO MAKE his occupancy of the property conveyed adverse to the bank, he must give it notice that he has ceased to hold it as president, and has commenced to hold it in its individual capacity.

WHERE CASHIER OF BANK EXECUTES DEED, BANK IS HELD TO HAVE NOTICE of its contents.

NOTICE IS GIVEN TO BANK, WHOSE PRESIDENT HAS MADE DEED OF CERTAIN of its property to himself, that such president is holding it in his individual capacity, where he purchases negroes, and employs overseers to farm said lands, as such acts are not performed by banks.

THIS was an action of ejectment, in which both parties claimed under the bank of Hawkinsville. At the trial, defendants in error, in order to establish their title, introduced in evidence a deed from the above-named bank, signed by its president, John Rawls, and countersigned by G. W. Hines, cashier, conveying the disputed premises to John Rawls. Plaintiff in error objected to the introduction of such deed, but the court overruled his objection, admitted the deed, and he excepted. Rawls also introduced evidence showing that from the date of the deed he took possession of the land thereby conveyed, and cultivated the same by his agents and negroes.

Lyon and Scarborough, for the plaintiffs in error.

Strozier, for the defendants in error.

By Court, LUMPKIN, J. The only question we propose to examine in this case is, Was the deed from Rawls, as president of the Hawkinsville Bank, to himself good either as title or color of title to protect his possession, which, it is conceded, continued for more than seven years?

It was assumed in the argument that the concurrence of four directors was necessary, by the charter of the Hawkinsville Bank, to convey land. There is no such provision in the charter. By the third of the fundamental rules of the constitution of said corporation it is provided, it is true, that not less than four directors shall constitute a board for the transaction of business: Prince, 107. But by a subsequent clause in the charter, it is declared that "the bills obligatory and credit notes, and all

other contracts whatever on behalf of said corporation, shall be binding upon the company, provided the same be signed by the president, and countersigned or attested by the cashier of the said corporation," etc.: Id. 108. This deed, then, in point of form, was sufficient. It is *prima facie* a good deed.

It is contended, however, that the president of the bank could not make a good deed to himself; and therefore that this deed is *ipso facto* void. We do not so understand the law. It looks with suspicion, it is true, upon contracts between trustee and *cestui que trust*. With still more odium upon contracts made by a trustee with himself. Still such contracts are not absolutely a nullity. Lord Erskine, while chancellor, decided that such deeds were void. But this decision was afterwards overruled: See Hill on Trustees, new ed., 159, and the authorities there cited.

Are there not circumstances connected with this case which go far to relieve it from suspicion? The deed was countersigned by the cashier. That officer is an important functionary in a bank. In most moneyed institutions he is pretty much the whole of it. The charter made it his duty to be a party to all contracts in which the corporation was concerned. This was required for important purposes; and amongst the rest, to be a check upon the acts of the president. It may be assumed that the cashier united in this sale, participated in its consummation. It was his duty to have received the two thousand dollars purported by this deed to have been paid for the land. The purchase money was paid, or it was not. If paid, the sale cannot be set aside without at least refunding the purchase money, or offering to do so. The receipt of the money and the retention of it for such a length of time is such an acquiescence in the sale as to amount to a confirmation.

But suppose, on the other hand, that the price was not paid, was it not the duty of the cashier to have notified the directors of the fact? In the absence of all proof, then, upon this point, is not the transaction relieved from the suspicion which the law attaches to this class of contracts? But suppose we are wrong in this view of the case, and that the deed is not good as title, is it not good, as the circuit court held it to be, as color of title? The objection to it in this aspect is that before the trustee John Rawls could be permitted to hold this land adversely to the bank, the *cestui que trust*, he must give notice that he had repudiated the trust, and that he occupied the land in his own

The cashier had actual notice of the fact, because he aided in executing the title. To whom else should notice have been given? The stockholders, or the directors, or both? We know of no such practice. This court ruled in the case of the *Bank of St. Marys v. Mumford*, 6 Ga. 44, that notice to the cashier was notice to the bank.

But in addition to this express notice, was not the very nature of the possession itself notice of an adverse holding? Was it ever known that a bank bought negroes, employed overseers, to farm lands? And yet all this was done by John Rawls from the date of his deed to the trial of the action. Could the bank have been misled or left in doubt as to the character of Rawls's occupancy? For whom and for whose use and benefits was this land cultivated?

RULE THAT TRUSTEE CANNOT PURCHASE TRUST PROPERTY is discussed in *Jewett v. Miller*, 61 Am. Dec. 751, and the note thereto.

ON REPUDIATION OF TRUST BY TRUSTEE, his possession becomes adverse, and the statute of limitations commences to run: *Tinnen v. Mebane*, 60 Am. Dec. 205; see also *Moffitt v. Buchanan*, 54 Id. 41, and note.

COLOR OF TITLE IS WRITING PROFESSING TO PASS TITLE, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used: *Beverly v. Burke*, 54 Am. Dec. 351, and note. A sheriff's deed to land should be admitted in evidence as color of title, even though unaccompanied by the execution under which the sale was effected: *Burkhalter v. Edwards*, 60 Id. 744, and note.

CASHIER OF BANK, AND NOT ITS PRESIDENT, IS ITS PRINCIPAL BUSINESS OFFICER: *Merchants' Bank v. Rawls*, 50 Am. Dec. 394; and the acts of the cashier are *prima facie* binding upon the corporation: *State v. Commercial Bank of Manchester*, 45 Id. 280, and note.

NOTICE TO OFFICER OR AGENT OF CORPORATION AFFECTS CORPORATION, WHEN: See note to *Bank of Pittsburgh v. Whitehead*, 36 Am. Dec. 188.

DEED UNDER CORPORATE SEAL PRIMA FACIE conveys the title of the corporation: *Burrill v. Nahant Bank*, 35 Am. Dec. 395.

OSBORN v. ORDINARY OF HARRIS COUNTY.

[17 GEORGIA, 123.]

IF FULL REDRESS HAS BEEN PROVIDED BY STATUTE, EQUITY IS OUSTED OF ITS JURISDICTION in such cases as partitions, the establishment of lost papers, the foreclosure of mortgages, the settlement of accounts, etc., notwithstanding the English rule adopted here giving equity exclusive or concurrent jurisdiction of such cases.

WHERE STATUTES OF STATE PROVIDE REMEDY UPON GUARDIAN'S and other trustee bonds, to give equity jurisdiction of such, a special case must be made by the bill. An allegation that the guardian is a non-resident, or

that before leaving the state he gave a large sum of money to his sureties to indemnify them, where the bill does not seek to pursue said sum as a trust fund, is insufficient.

RESPECTIVE RIGHTS OF SURETIES UPON GUARDIAN'S BOND may be adjusted at law under the act of 1826, allowing sureties to come in and make special defense at the trial and have a special verdict entered up fixing their respective rights and responsibilities, and consequently a resort to equity for that purpose is unnecessary.

BILL in equity, filed by the wards of Alexander S. Huey, against their former guardian and the sureties upon his bond as such guardian. The bill charged that Huey was utterly insolvent, that he had removed to the state of Arkansas, that he had wasted and converted to his own use all the estate of his wards, and that before he had left the state of Georgia he placed in the hands of his sureties sufficient funds to indemnify them from all loss by reason of their suretyship. The bill prayed for an accounting, and specifically a discovery from the sureties of the nature and amount of their assets. Osborn, one of the sureties, filed a general demurrer to this bill, from an order overruling which he took this appeal.

Welborn and Clark, for the plaintiff in error.

Ingram and Ramsey, for the defendant in error.

By Court, LUMPKIN, J. According to the case made by the bill, had the complainants a complete remedy at law? The rule, now well settled in this state, is that in reference to partitions, the establishment of lost papers, the foreclosure of mortgages, the settlement of accounts, etc., that notwithstanding, by the English law as adopted here, chancery may have had concurrent, or even exclusive, jurisdiction over these or any other subject, still if full redress has been provided by statute, equity in that case is ousted of its jurisdiction, unless a special case is made by the bill.

Now it is not denied but that by the laws of this state full provision is made for suits at law, on guardians', administrators', and other trustee bonds. To this forum, then, these parties must resort, unless they have brought themselves within the exception just stated. Have they done so? We have searched in vain for any statement to this effect.

The non-residence of the guardian does not confer jurisdiction. So far as the question of jurisdiction is concerned, the residence or non-residence of the principal is wholly immaterial. What special case, then, is made by the bill? It is not suggested that there is any complication in the accounts of the guardian

which cannot be adjusted at law. No discovery even is sought of the non-resident guardian, who *pro forma* is made a party, and upon whom service is prayed to be perfected by publication. Neither is any appeal made to the consciences of the securities to make disclosures. It is true that the bill alleges that the principal, when about to leave the state, placed in the hands of his securities some five thousand dollars in money or property, "to indemnify and save them harmless." But the bill does not seek even to pursue this as a trust fund set apart by the guardian for the discharge of his liability, nor is there any intimation that the securities are insolvent, or anything of that sort.

The only thing which seems to have been in the eye of the draftsman of the bill which needed the aid of a court of equity was the fact that this fund had been placed in the hands of the securities—the complainant not knowing the relative amount or portion received by each. Hence he asks for information upon that point, and insists in the argument that equity, abhorring a multiplicity of suits, will entertain this bill, especially for the purpose of adjusting the rights of the several securities. What has the complainant to do with this? Who constituted him the next friend of the securities? The favor which he tenders is not only not solicited, but respectfully declined. And, in our judgment, no court has the right to thrust this boon upon the sureties *nolens volens*, willing or unwilling. They know best—how best to protect themselves. Were it otherwise, and did this constitute a sufficient ground for the interposition of a court of equity, we are again met by the act of 1826, which allows securities to come in and make special defense at the trial, and have a special verdict entered up, fixing their respective rights and responsibilities.

If one of the securities had received from their common principal funds to protect him against the whole or any part of his liability, that surety became a principal, as to his co-sureties, *pro tanto*. And so the verdict and judgment, under the statute of 1826, would find and establish. And another surety paying the debt to the creditor would be entitled to control the *ji. fa.* to reimburse himself accordingly.

So, then, the last plank upon which this bill could stand is knocked from under it.

JURISDICTION OF EQUITY IS NOT TAKEN AWAY by a statute conferring jurisdiction on a court of law, in cases in which equity originally possessed jurisdiction: *Payne v. Bullard*, 55 Am. Dec. 74, and note in which the question is discussed. In this note the rule is stated as just above written. This seems to conflict with the principal case.

THE PRINCIPAL CASE IS CITED in *Newton Mfg. Co. v. White*, 47 Ga. 403, where the court say: "This court has held that where the legislature gives a specific remedy at law, equity jurisdiction ceases." It is also cited in *Mc-Lewis v. Furgerson*, 59 Id. 647, to the point that one of several co-sureties having indemnity is not permitted by the law to appropriate it to screen himself alone, but must admit his fellows to share in it on equal terms.

SHOCKLEY v. DAVIS.

[17 GEORGIA, 177.]

SPECIFIC PERFORMANCE WILL BE DECREED OF AGREEMENT TO TURN OVER CHOISES IN ACTION to indemnify the complainants against any loss they might sustain by reason of their suretyship for the defendant.

BILL FOR SPECIFIC PERFORMANCE OF AGREEMENT TO TURN OVER CHOISES IN ACTION as indemnity to the complainant should state with minuteness what books of account or evidences of debt were to be turned over, or if complainant could not obtain access to such choses in action, the bill should so state, and call upon the defendant to supply the deficiency.

WILLIAM D. SHOCKLEY agreed with defendant in error Davis and others that if they would become sureties upon two of his promissory notes, he would transfer and turn over to them his books of account and other evidences of debt, to secure them from all loss they might sustain by reason of such suretyship. In consideration of this agreement, they accordingly became such sureties. The above-mentioned books, etc., were partnership assets of Shockley & Wooding. The bill alleged that Shockley had refused to comply with his agreement, that he was in failing circumstances, and also that suits were pending against the sureties upon the notes. The bill prayed for specific performance. Defendant demurred to the bill, his demurrer was overruled, and he appealed.

Oliver and Hall, for the plaintiff in error.

Pryor, for the defendant in error.

By Court, LUMPKIN, J. Can this bill be sustained, filed as it is to enforce the specific performance of an agreement to turn over choses in action to indemnify the complainants against their securityship for the defendant? It is demurred to on several grounds. It is denied that a court of equity has jurisdiction over a bill for the specific performance of a contract relative to chattels. And ordinarily it has not, for the reason that adequate compensation, it was supposed, could be recovered at law for the breach of such a contract. All parties are entitled to a compliance with their contracts. And it is no good excuse that they

may recover damages at law for their breach. Instead of the party's having the benefit of his own agreement, the objection, upon principle, to this whole doctrine is, that it allows a court and jury to substitute so much money as they may think sufficient to indemnify the party against the injury he has sustained. Remedial justice will be incomplete until this defect in the law is cured; and until it shall be established that all parties shall be entitled to have their contracts executed, if it be practicable, due regard being had to the rights of third persons, which have intervened.

But whatever imperfection may exist in this respect, there is no want of power in the courts to maintain this bill, provided it was properly framed. The bill is not brought to enforce a contract of sale respecting chattels, but to compel the defendant to execute the indemnity which he promised to the complainants to induce them to become his sureties. No satisfaction could be made for the failure to perform such an undertaking, especially by a defendant who is, as alleged by the bill, "in sinking circumstances," and against whom judgments may be previously obtained by others. In which event, the remedy at law would prove to be wholly unavailing. Nor is it any answer against the equity jurisdiction that the complainant may attach or obtain a *ne exeat*. Did the complainants go into court upon general principles of equity, it would be competent to show that they had an adequate and ample common-law remedy. But not so when they pray the specific performance of a contract.

This bill, however, is deficient in two particulars: 1. In not stating what books of account or evidences of debt were to be turned over. If the complainants were unable to specify these choses in action with minuteness, for want of access to them, they should have charged this fact by way of excuse for their want of particularity, and have called upon the defendant to supply the deficiency. The charge in this respect is too vague. The decree cannot be more definite than the bill, and if rendered could not be enforced for uncertainty. Suppose a decree were rendered in conformity to the prayer of the bill, that the defendant turn over to the complainant his books of account and other evidences of debt, and an attachment were moved against him for not complying with the decree, could a court determine whether he had or had not? But again: the notes for which the complainants became surety are, upon their face, the individual debts of William D. Shockley. *Prima facie* he had no right to pledge the partnership effects for their payment, or

to secure those who were bound for him. True, the bill shows that these notes were given for the partnership debt of Shockley & Wooding to P. McLaren & Co.; still it should have been distinctly averred that these notes, although made by Shockley alone, were nevertheless the notes of the firm.

If the bill be amended in these particulars, and supported by satisfactory proof, the complainants will be entitled to the redress which they seek.

BILL FOR SPECIFIC EXECUTION OF CONTRACT, relating to chattels merely, does not lie where adequate remedy lies at law: *Cowles v. Whitman*, 25 Am. Dec. 60. But the rule that specific performance of a contract relating to personalty will not be enforced is limited to cases where compensation in damages furnishes a clear and adequate remedy: *Clark v. Flint*, 33 Id. 733; *Kimball v. Morton*, 43 Id. 621. The transfer of bank stock will be decreed where the party holding it received it with the understanding that he should transfer it to other parties: *Kimball v. Morton*, *supra*; see also *McGowin v. Remington*, 51 Am. Dec. 584, and note for exceptions to this rule. Specific performance will not be decreed unless the terms of the contract are clear and definitely ascertained: *Robbins v. McKnight*, 45 Id. 406; *Hudson v. Layton*, 48 Id. 167; *Aday v. Echols*, 52 Id. 225.

THE PRINCIPAL CASE IS CITED by Waterman in his work on specific performance, p. 25, where the rule is stated that equity will specifically enforce an agreement to give security for a debt.

WELLBORN v. WEAVER.

[17 GEORGIA, 267.]

NEW TRIAL WILL NOT BE GRANTED BECAUSE VERDICT WAS CONTRARY TO CHARGE OF COURT, if the charge was erroneous and the verdict was not. **SAVING IN STATUTE OF LIMITATIONS IN FAVOR OF MARRIED WOMEN DOES NOT APPLY** where the woman was unmarried at the time the right accrued, although she may have married afterwards on the same day.

WOMAN'S RIGHT TO SUE FOR CERTAIN SLAVES, AND HER PROPERTY THEREIN, UPON HER MARRIAGE, passes to her husband, and he alone can sue for their recovery. In such a case the statute of limitations begins to run against the woman from the accrual of her right, and against the husband from the date of his marriage.

EVERY PERSON IS PRESUMED TO ASSENT TO GRANT made for his benefit, and a grant made to a person directly or for his use, without notice to him, is good until he disagrees thereto.

DEED TAKES EFFECT ONLY FROM ITS DELIVERY, WHICH MAY BE BY WORDS without acts, or by acts without words, and may be made either to the grantee or to a third person, who has no special authority, for the use of the grantee; further, a grantee need not be personally present to accept the delivery of a deed.

MERE RETENTION OF DEED BY GRANTOR, OF ITSELF, WILL NOT AFFECT ITS VALIDITY, unless it be declared or understood, at the time of its execution, that the deed is not to pass out of the possession of the grantor.

DEED TO BE DELIVERED AT DEATH OF GRANTOR. Where the grantor in a deed of gift gave it to one of the subscribing witnesses, with instructions to have it recorded, and to hold it as his agent until he should be dead, and then to deliver it to the donees, which instructions were followed, it was held that it could not take effect as his present deed, nor as an escrow, but if valid at all, it must be as a testamentary paper, and be proved accordingly.

AUTHORITY GIVEN TO AGENT BY GRANTOR OF DEED TO DELIVER SAME, to be validly exercised, must be performed in the life-time of such grantor, as the agent's authority is terminated by his death.

DELIVERY IS AS ESSENTIAL TO VALIDITY OF ESCROW AS TO DEED; the only difference being as to the manner of delivery.

ESCROW GENERALLY TAKES EFFECT FROM DATE OF SECOND DELIVERANCE; but when justice requires a resort to a fiction, this time relates back to the first delivery, so as to give the deed effect from that time.

PERSON TO WHOM ESCROW HAS BEEN DELIVERED IS AGENT OF BOTH GRANTOR AND GRANTEE. He does not hold the deed subject to the control of the grantor, who has no power over it, and can no more countermand its delivery than he could that of an absolute deed.

REGISTRATION OF DEED DOES NOT AMOUNT TO DELIVERY THEREOF, and its being placed on record by the direction of the grantor is but *prima facie* evidence of its delivery, which may be explained and rebutted by testimony.

DEED, IF MADE WITH VIEW TO DISPOSITION OF MAN'S ESTATE AFTER HIS DEATH, will inure, in law, as a devise or will. Whether an instrument be a deed or will does not depend on its form or manner of execution, but upon its operation.

INSTRUMENT WHICH WAS IN FORM DEED may be shown to be a will, as the intention of the maker may be ascertained not only from the instrument but from extrinsic testimony. Declarations of a party in possession of property and exercising acts of ownership may be admitted in evidence, not for the purpose of showing title in himself, but for the purpose of rebutting the presumption that he held as trustee, and as fortifying his possessory title.

TROVER to recover two negroes. The plaintiffs were the children of the defendant's wife by a former marriage; the defendant was the plaintiffs' step-father, T. C. Wellborn. The negroes sued for had formerly been the property of Joshua Elder, who had delivered them to his daughter Sarah upon her marriage with S. B. Garnett, the plaintiffs' father. The testimony conflicted as to whether this delivery was as a loan or as a gift. However, after Sarah had retained possession of them during her married life with Garnett, and after his death until within a few days of her marriage with Wellborn, the defendant Elder took the slaves away from her. Elder continued to hold possession of the slaves until 1850, at which time he sent the woman (the two slaves were a mother and her son) to Wellborn's to wait upon his wife, and the boy ran away and joined

his mother at Wellborn's, who refused to give him up. Joshua Elder had, in 1842, executed a deed of gift to the plaintiffs of these two slaves. At the time of its execution Elder gave it to one of the subscribing witnesses thereto, with instructions to have it recorded, and to hold it as his agent until he should be dead, and then to deliver it to the donees. The agent followed these instructions. Joshua Elder died in 1851, and the donees in the above deed commenced suit for the recovery of the negroes. The facts above stated appeared in evidence, and the jury found a verdict for plaintiffs. Defendant moved for a new trial upon various grounds. His points upon the statute of limitations and the character of the above deed will appear from the opinion. One of his grounds was that the court erred in permitting one Chandler to testify as to the declarations of Elder before making the deed to plaintiffs, said declarations being made while the declarant was in possession of the property, and exercising acts of ownership over it, and showing title in himself. His motion for a new trial was denied, and he took this appeal.

Sims and Hammond, and Buchanan, for the plaintiff.

Doyal and Speer, for the defendant.

By Court, LUMPKIN, J. A new trial will not be granted because the verdict of the jury is contrary to the charge of the court, provided the verdict is according to law and the charge is against it.

Now we are clear that the saving in the statute of limitations in favor of *femes covert* does not apply where the *feme* was discovered at the time her right of action accrued, notwithstanding she may have married subsequently, on the same day.

In other words, marriage may be postponed, but not the statute of limitations. And then the act of 1817, Cobb's Dig. 567, which stops the running of the statute as to idiots, lunatics, and infants, does not extend to married women, notwithstanding the intervening disability of *coverture*.

Moreover, the negroes in dispute were taken possession of by Joshua Elder before the marriage of his daughter, Mrs. Garnett, with Wellborn, the defendant; and that being so, the better opinion is, not only that Wellborn might have sued alone, but that he must have done so. And the reason assigned is, because the law transfers the property to him, and the wife had no interest in it: See 1 Chitty's Blackstone, 360, note p; Bac. Abr., tit. *Detinue*, A; Bull. N. P. 50; *Ball v. Cross*, 1 Salk. 164; *sed contra: Harris v. Colliton*, Hardres, 120.

If this be so, not only did the statute of limitations begin to run against the wife *dum sola*, and continued albeit the intervening coverture, but it commenced to run against the husband also from the time of the marriage, which makes the statutory title of Joshua Elder and those claiming under him complete.

What is the true character of the paper executed by Joshua Elder to his grandchildren? Is it a deed or a testament? There is a conflict of authority upon this point; and our opinion has not been formed without some hesitancy.

The circuit court held that it was a deed, and the current of American cases is certainly with the decision. *Wheelwright v. Wheelwright*, 2 Mass. 447 [8 Am. Dec. 66], is the leading authority on that side, and has been cited and followed as law without questioning in all the subsequent adjudications. It was an application for partition. The petitioners produced, in support of their claim, two deeds purporting to be conveyances of the premises; and the dispute was whether or not the circumstances attending their execution amounted to a delivery, which it was admitted was essential to their operation. The evidence was this: Nathaniel Wells, esq., testified that in the year 1795 Joseph Wheelwright, one of the petitioners, requested him, by direction from his father, as he said, to write these two deeds; that having written them, the father called upon him, and signed and sealed the two deeds in the presence of the witnesses and his brother, since deceased, and delivered them to him for the use of the grantees; that it was the intent of the parties that the grantor should have the use of the premises during his life; and as some of the grantees were minors and could not secure the use to him, the deeds were delivered as escrows, as he expressed it, to be delivered by him to the grantees upon the death of the grantor, which the witness had accordingly done.

Upon this proof Chief Justice Parsons conceded that the objection that the testimony did not sufficiently show that these deeds were delivered by the grantor in his life-time to the grantees, or any person authorized by them to receive the same, deserved much consideration. Still he held the law to be well settled that if the grantor deliver any writing as his deed to a third person to be delivered over by him to the grantee on some future event, it is the grantee's deed presently, and the third person is the trustee of it for the grantee. And in support of this conclusion, the learned chief justice refers to Perk. 143, 144, and *Bushel v. Pasmore*, 6 Mod. 217, 218. I would merely remark that in all the cases quoted the papers were delivered

confessedly as escrows. In the second edition of the Massachusetts reports, the propriety of this opinion is doubted in the modest form of a query appended in a note to the case by the editor, Mr. Rand.

Can it be sustained upon principle? We do not controvert the doctrine that all such acts as give estates directly, or by way of use, are good at first, and that the thing granted when the deed of grant is delivered to the grantee's use shall vest in the grantee before he has notice of the grant, or agree to accept of the thing granted; so that if lands be granted immediately by feoffment, gift, etc., the thing granted shall be said to be in the grantee, and the grant good, before notice or agreement, until disagreement: *Shep. Touch.* 285; *Thompson v. Leach*, 2 Vent. 198; *Rex v. Bishop of London*, Show. 808; that every man is presumed to assent to a grant made for his benefit: *Wilt v. Franklin*, 1 Binn. 502, 503, 518, 520; that while it is true that a deed takes effect from the delivery, which may be by words without acts, or by acts without words, that such delivery may be either to the grantee or to a third person, who has no special authority, for the use of the grantee: *Shep. Touch.* 57, 58; *Campbell v. Hall*, Cowp. 204; *Verplank v. Sterry*, 12 Johns. 536 [12 Am. Dec. 348]; *Canning v. Pinkham*, 1 N. H. 357.

And further, that it is not essential to the valid delivery of a deed that the grantee be present, and that it be accepted by him personally: *Verplank v. Sterry*, *supra*; *Harrison v. Phillips Acad.*, 12 Mass. 460; *Chapel v. Bull*, 17 Id. 220; *Hatch v. Hatch*, 9 Id. 310 [6 Am. Dec. 67]; *Shep. Touch.* 58.

Moreover, we admit that the mere retention of the deed by the grantor, of itself, will not affect its validity, unless it be declared or understood at the time of its execution that the deed is not to pass out of the possession of the grantor: *Derby Canal Co. v. Wilmot*, 9 East, 360; *Naldred v. Gilham*, 1 P. Wms. 577; *Cotton v. King*, 2 Id. 358; *Ward v. Lant*, Finch's Prec. 182; *Clavering v. Clavering*, 2 Vern. 473; *Rogers v. Holled*, 1 Bro. P. C. 122; *Johnson v. Smith*, 1 Ves. sen. 314.

Still the inquiry recurs, Does the delivery of a writing as a deed to a third person, as the agent of the grantor, to hold during the life of the grantor and to be delivered at his death to the grantees, operate as the deed of the grantor presently? It is clear from the testimony that William B. Brown, to whom the paper was delivered, was not the agent of both parties, much less the trustee for the use of the grantees, which Wells, the witness, was assumed to have been by the proof in the case of

Wheelwrights. On the contrary, Brown held the deed subject to the control of Joshua Elder, as his agent, and countermandable by him, retaining as he did, and intended to do, the absolute power over it. The grantees could by no act on their part entitle themselves to the deed. The grantor never parted with the dominion over the title to the negroes; and the possession of Brown, his agent, was, in judgment and contemplation of law, the possession of Elder, the principal.

Conceding, then, that Elder intended to vest Brown with authority to deliver this deed after his death, and deposited it with him for the sole purpose of enabling him to do so, is this an actual delivery of the deed? For while an authority to deliver may be revoked, and is absolutely determined by death, the delivery itself cannot be recalled. A deed delivered is out of the reach of the grantor. Did the grantees, the grandchildren, acquire any title to the negroes until the deed was delivered to them, after the death of Joshua Elder, the grantor? Did Joshua Elder divest himself of the title to the slaves by depositing the deed with his agent, subject exclusively to his own control, and in no event to be delivered till after his death? Brown had no authority to deliver the deed during the life of Elder. He was expressly restrained from doing this. Had he done it, his delivery would have been void, not being in pursuance of his authority. He had only a naked power to deliver the deed after the death of the grantor. Could Elder create such an authority, to be executed after his death, uncoupled with an interest? No man can, we apprehend, by deed, much less by parol, create a naked power which shall survive him. For although the authority may, by its terms, be unlimited, it is nevertheless determined by the death of the principal: Co. Lit. 52, b; *Utterson v. Mair*, 4 Bro. C. C. 271. These authorities, and numerous others which might be cited to the same effect, establish the foregoing position. Brown's authority, then, was determined by the death of Elder, and the delivery after was void. Signing, sealing, and the delivery of a deed may either or all be performed by an attorney. They must be done, however, in the life-time of the grantor. If the grantor, after the execution of a deed, puts it in his scrutoire or hands it to his agent, declaring at the same time that it is not to be delivered till his death, it is inoperative as a deed for want of actual tradition.

And it by no means relieves the difficulty by considering this instrument as an escrow. Delivery is as essential to an

escrow as to a deed; the only difference being that in one case the grantor makes the delivery to the grantee, and in the other to a stranger or third person. In either case, until the grantor makes the delivery, the instrument is a dead letter: *Perk.* 137, 138; *Jackson ex dem. Gratz v. Callin*, 2 Johns. 248 [3 Am. Dec. 415].

Generally, an escrow takes effect from the second delivery, and is to be considered the deed of the party from that time. But this general rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity to avoid injury to the operation of the deed from events happening between the first and second delivery. When one makes a deed and delivers it as an escrow, and dies, or in the case of a *feme sole* marries, before the second delivery, the relation back to the time when the grantor was in life or the *fems* was *sole* is necessary to render the deed valid: 2 Bla. Com. 307; 13 Vin. Abr. 29; Cru. Dig., l. 32, c. 2, secs. 87-91; Com. Dig., *Fait, A*, 3. And upon these excepted cases Judge Parsons put his decision in *Wheelwright v. Wheelwright*, 2 Mass. 447 [3 Am. Dec. 66], and decided that a writing delivered to another by the grantor, not as his deed, to be delivered to the grantees after the death of the grantor, becomes the deed of the grantor, by such second delivery, from the time of the first delivery. But was this instrument deposited in the hands of Brown as an escrow? In every case of an escrow there is a contract and privity between the grantor and grantees. The person to whom the deed is delivered is by mutual agreement constituted the agent of both parties. He does not hold the deed subject to the control of the grantor. He has no power over it, and can no more command the delivery of an escrow than of an absolute deed. And it is always in the power of the grantee to entitle himself to the deed and to the estate by performing the stipulated condition. And when performed, the deed takes its whole effect by force of the first delivery, without any new delivery: *Perryman's Case*, 5 Co. 84 b. But here no money was to be paid, no condition to be performed. The delivery was dependent merely upon the lapse of time. In such a case, is it necessary or proper to resort to a violent fiction, *ut res valeat*, etc.? In every one of the excepted cases cited by Judge Parsons there was a condition to be performed as a part of the contract, and that, too, for a valuable consideration. Under such circumstances, there may be some propriety of putting a case in this class of exceptions.

But such was not the case of *Wheelwright*; neither is it the case before us. We say this with all possible respect for the eminent lawyer who made that decision.

Being satisfied that the act of registering a deed does not amount to such a delivery of it as will transfer the title from the grantor to the grantee, and that it being placed on the record by the direction of the grantor is at most but *prima facie* evidence of its delivery, which may be and is effectually explained and rebutted by the testimony of plaintiffs themselves, it appears to us unnecessary to enter into a minute investigation of the doctrine upon this subject.

Whether an instrument be a deed or will does not depend on its form or manner of execution, but upon its operation, has been repeatedly ruled by this court. If it is not to operate till after the death of him who makes it, it is a will, whatever be its form. A deed, if made with a view to the disposition of a man's estate after his death, will inure in law as a devise or will: *Shergold v. Shergold*, 1 Phillim. 10, note *h*; *Warwick v. Taylor*, Id. note *i*; *Thorold v. Thorold*, Id. 1; *Green v. Proude*, 1 Mod. 117; *Peacock v. Monk*, 1 Ves. sen. 132; *Hixson v. Wytham*, 1 Ch. Cas. 248; *Melham v. Duke of Devon*, 1 P. Wms. 529; *Healey v. Copley*, 7 Bro. P. C. 496; *Attorney General v. Jones*, 3 Price, 368; *Anonymous*, Dyer, 314; 6 Pl. 97; 1 Powell on Devises, Jarman's ed., 10, 52, and notes; 1 Roberts on Wills, 145.

In *Habergham v. Vincent*, 2 Ves. jun. 204, this whole subject was elaborately discussed, and the law deliberately settled as here stated. All the authorities that bear on this question are there collected, on which that profound lawyer, Justice Buller, says: "These cases have established that an instrument in any form, whether a deed, poll, or indenture, if the obvious purport is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of these there were express words of immediate grant and a consideration to support it as a grant; but as upon the whole the intention was that it should have a future operation after death it was considered as a will."

It was held by the circuit judge that an instrument which is in form a deed cannot be converted into a will unless it appears from its face that it was not to operate till after the death of the grantor. But the authorities do not warrant this distinction. On the contrary, it has been repeatedly held that the intention of the maker may be ascertained not only from the instrument but from extrinsic testimony: *Green v. Proude*, 1

Mod. 117; *Lyles v. Lyles*, 2 Nott & M. 531; *Milledge v. Lamar*, 4 Desau. 617; *Habergham v. Vincent*, 2 Ves. jun. 204; *Rigden v. Vallier*, 255, 258. The result of the whole matter is, then, that the plaintiffs cannot claim title to the property in suit, under this instrument, as a deed; but that if valid at all, it must be as a testamentary paper, and be proved accordingly.

We see no error in the court in allowing the testimony of Chandler to be introduced, as to the claim of title to the negroes by Elder, while he had them in possession, not that he could actually create title in himself by such declarations, but they served to rebut the presumption that he held as trustee for his daughter; and thus answered the purpose of fortifying his possessory title.

DEEDS TO TAKE EFFECT AFTER DEATH OF GRANTOR.—This subject is discussed at considerable length in the note to *Jones v. Jones*, 16 Am. Dec. 39. In this note it is said that "where a deed is left with a third person to hold it until the grantor's death, and then to deliver it to the grantees, the weight of authority seems to be in favor of the doctrine that if there is no reservation by the grantor of the privilege of recalling the deed before his death, but if he delivers it to the depositary with the absolute and final determination that it shall take effect when the contingency of his death happens, it will become operative upon its delivery, after his death, to the grantees, and such delivery will relate back to the prior delivery for the purpose of passing the grantor's title." A number of cases are then cited which fully bear out this statement of the law. In addition to those cases, the following may be cited as being directly in point: *Howard v. Patrick*, 38 Mich. 805; *Phillips v. Houston*, 5 Jones L. 302; *Hockett v. Jones*, 70 Ind. 227; *Ruggles v. Lawson*, 7 Am. Dec. 375; *O'Kelly v. O'Kelly*, 8 Met. 436; *Stephens v. Huns*, 54 Pa. St. 20; *Tooley v. Dibble*, 2 Hill (N. Y.), 641; *Milledge v. Lamar*, 4 Desau. 617; *Foster v. Mansfield*, 37 Am. Dec. 154; *Wall v. Wall*, 30 Miss. 91, and the leading English case of *Doe ex dem. Garnons v. Knight*, 5 Barn. & Cress. 639. The above manner, to wit, the delivery of a duly executed and acknowledged deed to a third person to hold as an escrow, to be delivered upon the grantor's death, appears to be about the only means by which a grantor can effect his purpose of vesting his estate by a deed in his grantees, after his (the grantor's) death, as a deed which purports to convey an estate of freehold, to commence upon the death of the grantor, but which reserves to the grantor the use, enjoyment, and possession of the property during his natural life, is void, as creating an estate of freehold to commence *in futuro*: *Hawes v. Stebbins*, 49 Cal. 369; *Gale v. Coburn*, 18 Pick. 397. However, such a conveyance may operate as a covenant to stand seized to uses: *Gale v. Coburn*, 18 Pick. 397; *Wall v. Wall*, 30 Miss. 91; or in a proper case a court of equity may decree a formal conveyance of the fee from the grantor to the grantees, and a reconveyance back for the life of the former: *Chandler v. Chandler*, 55 Cal. 267.

In the above-mentioned case of *Doe ex dem. Garnons v. Knight*, Bayley, J., says that "a delivery to a third person will be sufficient if such delivery puts the instrument out of the power and control of the party who executed it, though said third person does not pass the deed to the person who is to be benefited by it until after the death of the party by whom it was executed." In this

case the circumstances from which the court inferred a sufficient delivery in escrow, and a putting of the deed out of the grantor's control, were his executing it in the presence of a witness, and saying, "I deliver this as my act and deed," and his subsequently delivering a package containing the deed to his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons." In *Stephens v. Huss*, 54 Pa. St. 20, the grantor in several deeds gave them to a third person, with directions to hand them, after the grantor's death, to the persons to whom they were made, and to have the deeds of such as might be minors recorded. The depositary did as he was directed, and the court held the delivery perfect and the deeds operative. In *Ruggles v. Laweon*, 7 Am. Dec. 375, a deed was duly executed by the grantor in his life-time, and delivered to a third person to be delivered to the grantees, in case the grantor should die before having made and executed his will. The grantor did die without having made any will, and the deed was, after his death, delivered to the grantees. The court say: "If this deed is to be construed as an escrow, the estate, under the circumstances stated in the case, passed to the grantees upon the delivery after the death of the grantor. It is a well-settled rule with respect to an escrow; that if either of the parties die before the condition is performed, and afterwards the condition is performed, the deed is good, and takes effect from the first delivery." The delivery of a deed to a third person to be delivered to the grantee after the grantor's death, and the delivery thereof by such third person before the grantor's death in breach of the trust imposed upon him, is a sufficient delivery to vest title at the death of the grantor: *Wallace v. Harris*, 32 Mich. 380-398.

A rather severe case illustrative of the rule that deeds of the character under discussion are valid, and that upon the second delivery they relate back and are effective from the date of the first delivery, is *Tooley v. Dibble*, 2 Hill (N. Y.), 641. In this case a son, in whose favor a deed had been made and delivered in escrow by his father, to await the father's death, made a quitclaim deed of his "right of expectancy" in his father's estate. This latter instrument was executed after the delivery in escrow of the first deed. Upon the father's death his deed was delivered to his son, and in an action of ejectment it was held that this deed related back and was effective, as from the first delivery, and that the son had, by his quitclaim deed, conveyed his title to the lands thereby acquired. To the same effect, as to the relation back to the date of the first delivery, is *Foster v. Mansfield*, 37 Am. Dec. 154. All the cases recognize this rule.

GRANTOR MUST PART WITH ALL DOMINION OR CONTROL OVER INSTRUMENT.
As has been intimated above, it is necessary to the validity of deeds of the character under discussion that they pass absolutely out of the control of the grantor. They cannot take effect while they remain in his possession or are subject to his control. The deposit of a deed with a third person is not a good delivery to the grantee if the grantor continues till his death to have the right to recall the deed from the depositary, although the grantor may not have intended to retain such right, and does not exercise it: *Baker v. Haskell*, 47 N. H. 479; *Prutman v. Baker*, 30 Wis. 644; *Wiggins v. Lush*, 12 Ill. 132; *Brown v. Brown*, 66 Me. 316; *Phillips v. Houston*, 5 Jones L. 302; *Bailey v. Bailey*, 7 Jones L. 44; *Stillwell v. Hubbard*, 20 Wend. 44; *Ball v. Foreman*, 37 Ohio St. 139; *Cook v. Brown*, 34 N. H. 460; *Jones v. Jones*, 16 Am. Dec. 25; *Gilmore v. Whitesides*, 31 Id. 563. *Belden v. Carter*, 4 Id. 185, is somewhat of a limitation on the above rule. In that case the grantor took his duly executed deed to the depositary, and said: "Take this deed and keep it; if I never call for it, deliver it to B. after my death; if I call for it,

deliver it to me." The grantor died, and the deed was delivered to the grantee. This was held to be a good delivery. So in *Wall v. Wall*, 30 Miss. 91, the court held that as between grantor and grantee the fact of the retention of the deed in the possession of the grantor, if he intends it to be considered as executed and delivered, will not render it invalid for want of delivery. For a further discussion of this question, see note to *Jones v. Jones*, 16 Am. Dec. 32.

MERE LODGMENT OF DEED IN PLACE TO WHICH GRANTOR HAS ACCESS is not sufficient. Such a case was *Hsey v. Hsey*, 65 Mo. 689. A father, having already given land to each of his other sons, executed and acknowledged an instrument conveying a tract to defendant by way of gift, and with defendant's knowledge deposited and kept it with his other papers in a chest, to which defendant, who lived with him, had access. The father declared that his intention was that defendant should have the deed and the land after his death, and that the deed should not be recorded until then, since he might have occasion to make a change. After his father's death defendant took the deed and had it recorded. The court held that this instrument could not take effect as a deed, for want of delivery.

FINDING DEED AMONG EFFECTS OF GRANTOR AFTER HIS DEATH IS INSUFFICIENT. The act of signing and sealing a deed gives it no effect without delivery, which is a substantive, specific, and independent act. Consequently, where a deed, after being duly signed, sealed, witnessed, and acknowledged by the grantor, is retained by him, and is found among his papers after his death, it is inoperative, and cannot be made to take effect by a delivery after his death: *Wiggins v. Lusk*, 12 Ill. 132; *Miller v. Physick*, 24 Ark. 244; *Fisher v. Hall*, 41 N. Y. 416; *Martin v. Ramsey*, 5 Humph. 349; *Patterson v. Snell*, 67 Me. 559. In *Wiggins v. Lusk*, 12 Ill. 132, the court say: "The evidence introduced on the part of the plaintiff showed that the deed, after being duly acknowledged, was retained by the grantor, and was found among his papers after his decease. The grantee was not present when the deed was executed; and it is very evident that he was not aware of its existence until after the death of the grantor. It is an irresistible inference from this proof that the grantor never parted with the control over the deed; in other words, it effectually rebuts any presumption arising from the other facts of the case that the deed was ever delivered to the grantor, or to any one for his use. It was no doubt at one time the intention of the grantor to convey the land to McDowell, but he died without carrying the intention into effect. His design was but in part executed; it was never consummated so as to give the deed any legal operation."

But the case of *Wall v. Wall*, 30 Miss. 91, appears to be somewhat of an exception to this rule. There the deed was found among the effects of the grantor, but the grantee knew of its existence before, had consulted with the grantor about it, and the grantor, just before his death, wrote to the grantee telling him where to find the deed. The court held that, as between grantor and grantee, the fact of the retention of the deed in the possession of the grantor, if he intended it to be considered as executed and delivered, would not render it invalid for want of delivery. This question is further discussed in note to *Jones v. Jones*, 16 Am. Dec. 41. A deed which appears to have been intended by the testator as a testamentary disposition of his property, and which is retained by the testator in his possession while he lives, is deprived of all force as a deed: *Patterson v. Snell*, 67 Me. 559; *Stillwell v. Hubbard*, 20 Wend. 44.

ASSENT OF GRANTEE TO DEED DELIVERED TO THIRD PERSON for his benefit is presumed, although his dissent may be shown, and the deed thereby

rendered ineffectual: *Lady Superior v. McNamara*, 49 Am. Dec. 184; *Merrills v. Swift*, 48 Id. 315; *Peavey v. Tilton*, 45 Id. 365, and note; *Moore v. Giles*, 49 Conn. 570; *Rivard v. Walker*, 39 Ill. 415; *Ebbererry v. Boykin*, 65 Ala. 336. A very interesting case upon this question, and one in which it was discussed at considerable length, is *Hibberd v. Smith*, Sup. Ct. Cal., July 30, 1884, 3 West Coast Rep. 446.

DEED DELIVERED AS ESCROW TAKES EFFECT IMMEDIATELY upon the performance of the condition; and if necessary to protect intervening rights of the grantee, it will be held to take effect from its first delivery as an escrow: *Shirley v. Ayres*, 45 Am. Dec. 546; *Foster v. Mansfield*, 37 Id. 154.

DEPOSITORY OF ESCROW IS AGENT OR TRUSTEE OF GRANTEE: *Wheelwright v. Wheelwright*, 3 Am. Dec. 66; *Jones v. Jones*, 16 Id. 39, and note; nor is his authority revoked by the death of the grantor: *Hockett v. Jones*, 70 Ind. 227.

RECORDING DEED IS ONLY PRIMA FACIE EVIDENCE OF ITS DELIVERY: *Gilbert v. North Am. Fire Ins. Co.*, 35 Am. Dec. 543; *Snyder v. Lackenour*, 38 Id. 685. See also *Jackson v. Ten Eyck*, 2 Wend. 308; *Gragg v. Learned*, 100 Mass. 167; *Wiley v. Dennis*, 44 Barb. 354; *Van Valen v. Shemerhorn*, 22 How. Pr. 416.

MARRIAGE AS AFFECTING STATUTE OF LIMITATIONS: See note to *Moore v. Armstrong*, 36 Am. Dec. 69, where *Wellborn v. Weaver* is cited and commented upon; see also *Perkins v. Cartmell*, 42 Id. 723.

THE PRINCIPAL CASE IS CITED in *Murdock v. Mitchell*, 30 Ga. 76, to the point that a wife and her husband can maintain ejectment against an adverse claimant of the wife's property, and that if they fail to do so the statute will bar her right; and in *Crawford v. Gaulden*, 33 Id. 173-182, to the point that where a verdict is right in itself it will not be disturbed because erroneous instructions were given to the jury. The act of recording a deed is but *prima facie* evidence of a delivery, which may be rebutted and explained: *Harvill v. Lowe*, 47 Id. 214. A grantor cannot deliver a deed to the grantee or his attorney as an escrow. Such a delivery would be equivalent to adding a parol condition to the instrument. To make the deed an escrow, it should be delivered to a third person, to be by him delivered to the grantee upon the performance of any required condition: *Duncan v. Pope*, Id. 445-451. Each of the above cases cite the principal case. It is also cited in *Watson v. Watson*, 22 Id. 461, where a certain instrument is construed to be a deed instead of a will. This is a very interesting case.

WOOD v. MCGUIRE'S CHILDREN.

[17 GEORGIA, 361.]

VERDICT MUST COMPREHEND WHOLE ISSUE OR ISSUES SUBMITTED TO JURY in a particular cause, and must find certainly, either for or against every party to the suit.

EVERY REASONABLE CONSTRUCTION SHOULD BE ADOPTED FOR PURPOSE OF WORKING VERDICT INTO FORM, so as to make it serve; but this rule is limited to cases where the jury have expressed their meaning in an informal manner. The court has no power to supply substantial omissions.

DEFECTIVE VERDICT.—In an action of ejectment, where the verdict is silent as to one of the plaintiffs, the court is not at liberty to answer for the jury whether the judgment should be for the plaintiff or the defendant, and consequently the verdict is defective.

EJECTMENT brought by Lovick McGuire and four others, the children of Milly McGuire, against Wood and Johnston. At the trial of the action the jury returned the following verdict: "We, the jury, find in favor of the plaintiffs [naming all of them except Lovick McGuire], to the undivided four fifths of the premises in dispute," etc. The defendants moved to have this verdict set aside, upon the ground that it did not find as to one of the parties plaintiff, Lovick McGuire. The court overruled this motion, and its decision is now assigned as error.

Stubbs and Hill, for the plaintiffs in error.

Lanier and Anderson, and Poe, for the defendants in error.

By Court, LUMPKIN, J. Lovick McGuire was a party plaintiff in the suit. It was admitted and the proof showed that he had conveyed his interest to the defendants. The court charged the jury that they were bound to find against him. They were certainly bound to find either for or against him; and failing to do either, the verdict and judgment are imperfect, and should have been vacated.

The general rule undoubtedly is, that the verdict must comprehend the whole issue or issues submitted to the jury in the particular cause; otherwise the judgment founded on it should be reversed: 1 Arch. Pr. 190; *Patterson v. United States*, 2 Wheat. 225; *Miller v. Trefts*, 1 Ld. Raym. 324. In *Holmes v. Wood*, 6 Mass. 1, the supreme court of Massachusetts held that if the issue joined be material, the verdict ought to find the issue either for or against the party tendering it.

Indeed, the circuit judge recognized the rule, but was of the opinion that the point in issue could be concluded from the finding of the jury in this case; that the court could work the verdict into form and make it serve. If this could be done, the verdict should stand, and every reasonable construction should be adopted for this purpose: *Goss v. Withers*, 2 Burr. 693; *Thompson v. Button*, 14 Johns. 84; *Huntington v. Ripley*, 1 Root, 821.

In *Kerr v. Hawthorne*, 4 Yeates, 293, Chief Justice Tilghman very properly limits the authority of the court to cases where the jury have expressed their meaning in an informal manner, and says the court has no power to supply substantial omissions.

But the difficulty here is, not that the jury have expressed their meaning in an informal manner, but they have failed to express any opinion at all as to one of the parties. True, they

have not found for Lovick McGuire; but are we authorized to say that they intended to find against him? How shall the verdict be amended, then? For this plaintiff or for the defendants, as to him? The verdict gives no response to this question; and the court is not at liberty to answer for the jury. *Petric v. Hanney*, 3 T. R. 659, and *Richardson v. Mellish*, 8 Bing. 334, are authorities for amending informal verdicts. But here there is nothing whereby an amendment can be made.

Under Jones's Forms, under which this complaint was filed, it may become important that even in ejectments the verdict and judgment should be commensurate with the issue. But as already stated, they should be so in all cases, independent of the act of 1847.

COURT MAY MOLD VERDICT so as to meet the facts of a case and the ascertained conclusions of the jury: *McMahon v. McMahon*, 53 Am. Dec. 481; but the verdict cannot be amended after the jury is discharged, when it does not appear upon the face of the verdict that the alteration would be agreeable to their intention: *Settle v. Alison*, 52 Id. 393. A verdict should designate not only those of the plaintiffs in favor of whom it finds, but also those against whom it finds; otherwise the verdict would be imperfect, as not finding upon all of the issues submitted: *Settle v. Alison, supra*. A verdict of "guilty on the first account" may be corrected by the court by striking out the first syllable of the word "account," making it read "count;" *Roberts v. State*, 58 Id. 528. See the case of *Wittick v. Traen*, 62 Id. 778, for a case similar to the principal case, where a verdict was held defective because it failed to find for or against one of the parties to the action.

THE PRINCIPAL CASE IS CITED in *Cunningham v. Bradley*, 26 Ga. 239, where the court hold that the plaintiff in ejectment may amend by striking out two of three defendants, and proceed against the third.

MILLER v. CONKLIN & Co.

[17 GEORGIA, 480.]

ASSIGNMENT FOR BENEFIT OF CREDITORS, WITH CONDITIONS OF RELEASE,
will not be upheld in Georgia.

IN STATE OF GEORGIA, ASSIGNMENT BY FIRM OF ALL ITS ASSETS FOR USE
AND BENEFIT of all such of their creditors as should within ninety days
file their claims with the assignee and release the said firm from all liability
therefor is void as to all creditors who object to such assignment.

GARNISHMENT process, issued to S. F. Miller, sued out against him as garnishee by Conklin & Co., who had obtained a judgment against another firm; assets of which, as they claimed, were in the hands of said Miller. The garnishee made return that he had "no effects," and at the same time stated that the

above-mentioned judgment debtor had executed to him a deed of assignment for the use and benefit of all such of their creditors as should file their claims with the assignee within ninety days, and release the said firm from all liability therefor. It is unnecessary to set out the remaining provisions of the assignment here. The amount which Miller held in his hands by virtue of this assignment was admitted. The court below held this assignment void, and its decision is now assigned as error.

Miller and Hall, for the plaintiffs in error.

Cook and Montfort, for the defendants in error.

By Court, STARNES, J. The point now presented has never been expressly adjudicated in this state. In England, where legal policy permits and encourages bankrupt laws, assignments with conditions of release are upheld by the courts. We find a considerable conflict of opinions on the subject, when we look to the decisions in the United States. In some, such assignments are supported; but in the majority, where the question has been made, they have been held illegal. Where they have been sustained, it will be found, we think, that the first decisions on the subject were made in the earlier days of the republic, when our policy, legal and commercial, had but slightly diverged from that of Great Britain. This seems to be true of Virginia, Pennsylvania, and South Carolina: See cases cited in 1 Am. Lead. Cas. 83. It is also true of Massachusetts, we believe: Id. 84.

The case of *Brashear v. West*, 7 Pet. 609, which was a decision by Chief Justice Marshall, sustains the same doctrine. But it is put upon the authority of the Pennsylvania decisions, being made in a Pennsylvania case, and that distinguished person, in making the decision, expresses "doubt and regret," and condemns the morality of such a transaction. So in *Halsey v. Whitney*, 4 Mason, 207, 227, 230, such an assignment was supported by Mr. Justice Story, upon "the supposed opinions of the profession in Massachusetts;" but he, too, condemns the principle on which it is based. In the state of Alabama it was decided, two judges dissenting, in an early case that such an assignment was valid; but we are told that that decision has been reluctantly adhered to on the ground of mere authority: 1 Am. Lead. Cas. 84. A different rule prevails in New York, Connecticut, Ohio, Illinois, Missouri, Mississippi, and North Carolina. And in Maine and New Hampshire, statutes have been passed for the purpose of requiring equality of distribution among creditors.

Now, if unassisted by our own legislation, and left to decide between these conflicting views of courts, we think we should not have much difficulty in arriving at a satisfactory conclusion. In our opinion, the arrangement gives to the debtor an advantage which is not consistent with a pure morality or accurate justice—an advantage which enables him, in the language of Judge Sutherland, in *Grover v. Wakeman*, 11 Wend. 200 [25 Am. Dec. 624], "to operate upon the fears of his creditors and coerce them into his own terms." It proceeds, in short, on principles which have been condemned by such men as Marshall and Story and Kent, even while the first two have been compelled to sustain such an assignment in particular cases, by reason of precedent applicable to these cases. We have no such precedent in our state, and are free to adopt that which we deem the more wholesome rule, if we were compelled to choose between these conflicting views of courts, and to determine the question upon principle alone.

Some of the cases which maintain the legality and propriety of such an assignment have gone upon the idea that the debtor has the right, *bona fide*, to prefer one or more of his creditors, and pay the debts due to them with his property. On this principle, Chancellor Johnson (Job Johnson) of South Carolina puts the case in *Nolan v. Douglas*, 2 Hill Ch. 451, perhaps as strongly as it can be found elsewhere. He sets out by granting the debtor's right to prefer one creditor over another, and says: "Then if it would have been no fraud on him [the creditor] to prefer others over him with or without conditions, is he defrauded by giving him an opportunity to participate with them? —an opportunity which it would not have been fraudulent in Johnson [the assignor] to have withheld from him?" This is the whole strength of the argument. To our mind, it is not satisfactory. The law gives to the creditor the right to prefer necessarily, and this is advantage enough. Our statute of 1818 sanctions this right expressly. Let him use this advantage and prefer any creditor he pleases, and pay away his property to such creditor as he has the right to do in good faith. But let him not use the threat of doing this as a sort of moral duress by which he may coerce his creditors into an agreement which they would not otherwise approve. Lend him not the hand and the strong arm of the law in doing this. So that if there were nothing else to aid us in taking sides on this question, so much mooted in this country, whether or not such an assignment was of a character "to hinder and delay creditors," therefore as contrary

to 13 Elizabeth, void and illegal in our state, these considerations would influence and control our views on this subject.

But there is something else; and that, in our opinion, is the stress of our own legislation. We not only have no bankrupt laws, but our policy and the public sentiment of our people are opposed to them. And what is such an assignment but a private bankrupt law? A bankrupt law executed by the debtor for his own benefit! Does he not thus release himself from his debts by compelling his creditors to take what he can pay? Our statute of 1818, if not in express terms or by necessary implication, yet in its whole scope, purpose, and spirit, prohibits such an assignment. Like the statutes of Maine and New Hampshire, it was intended to insure "equality of distribution among creditors;" for it declares the assignment void if "any creditor shall or may be excluded from an equal share of the estate so assigned," etc. And a proviso declares that "nothing contained in this act shall prevent any person from selling or disposing of any part or the whole of his, her, or their estate, so the same be free from any trust for the benefit of the seller, or any person appointed by him;" thus affording a key to the mind of the legislature, and indicating how they intended this equal distribution to be made, viz., on such terms as should be free from any trust for the debtor's benefit. But is an assignment with condition of release such a disposition of the property as is without a trust for the debtor's benefit? If not, it is contrary to the scope and spirit of this statute if not to its letter.

Our legislature has also manifested its abhorrence of unequal assignments by its penal provisions (treating the same as a felony) against insolvent banks making assignments in contemplation of insolvency, which are not for the benefit of all the creditors and stockholders.

Of course this decision goes no further than the case made. We do not undertake to say that such an assignment would not be binding on the creditors if they were all to accept, and no one was injured by it; nor as between the parties—the debtor and the assignee.

Judgment affirmed.

DEBTOR MAY GIVE PREFERENCE to particular creditors or sets of creditors: *Keykendall v. McDonald*, 57 Am. Dec. 212. He may sell, assign, or transfer his effects to a single creditor or a number of his creditors, and such transfer, if made in good faith, will not be disturbed: *Millburn v. Beach*, 55 Id. 91. Preferring a creditor whose demand is usurious is not a fraud on other creditors, and does not avoid an assignment containing such preferences;

Murray v. Judson, 59 Id. 516. An assignment for benefit of creditors containing a provision making preference to certain creditors in the distribution of the assigned property to depend upon the execution by them of a release to the debtor of all claims against him is void; and being void in part as against creditors, it is void *in toto*, notwithstanding the denial of the intent to defraud contained in an answer to a bill in chancery, filed to avoid the assignment: *Grover v. Wakeman*, 11 Wend. 189. So in Massachusetts, a general assignment by an insolvent debtor in trust that the assignees shall, with the proceeds of the property assigned, pay certain creditors in full, and shall apply the surplus of the proceeds to the payment *pro rata* of other creditors who shall within a certain time release their claims against the debtor is invalid, as against a dissenting creditor, so far as respects the surplus not wanted to satisfy the demands of those who have come into the compact: *Borden v. Sumner*, 4 Pick. 264. This question is discussed by Kent in his Commentaries, vol. 2, p. 393. The following cases may be consulted upon this question: That such assignments are valid, see *Fox v. Adams*, 5 Greenl. 245; *Canal Bank v. Cox*, 6 Id. 395; *Haven v. Richardson*, 5 N. H. 113; *Halsey v. Whitney*, 4 Mason, 206; *Cheever v. Clarke*, 7 Serg. & R. 510; *Wilson v. Keppley*, 10 Id. 439; *Sheepshanks v. Cope*, 14 Id. 35; *Rex v. Watson*, 3 Price, 6; *Holmes v. Love*, 3 Barn. & Cresc. 64; *De Caters v. Le Ray de Chaumont*, 2 Paige, 491; that they are invalid, see *Lord v. Brig Watchman*, 8 Am. Jur. 338 (Maine); *Ingraham v. Wheeler*, 6 Conn. 277; *Mackie v. Cairns*, 1 Hopk. Ch. 424; S. C., 5 Cow. 547; *Armstrong v. Byrne*, 1 Edw. Ch. 79.

THE PRINCIPAL CASE IS CITED in *McBride v. Bohanan*, 50 Ga. 527, where the court held that an assignment by an insolvent debtor for the benefit of his creditors, provided they would take the property in full satisfaction of their claims, is not binding on a creditor who refuses to accept the same. It is also cited in *Lay v. Seago*, 47 Id. 82, where the court hold a certain conditional deed to a creditor is valid.

WALKER v. WELLS.

[17 GEORGIA, 547.]

MANNER IN WHICH GRANTS ARE MADE AND CERTIFIED IN ENGLAND, and the manner in which proceedings are conducted to set the same aside, recited.

GRANTS ARE ENROLLED IN OFFICE OF SECRETARY OF STATE IN GEORGIA, which office is an establishment distinct from any of the courts of that state, and belongs to an independent branch of the government.

COURTS CANNOT ACQUIRE JURISDICTION BY PROCESS OF SCIRE FACIAS over disputed questions relative to grants. *Scire facias* is always founded upon a record, and issues from and is made returnable to the court where the record is kept.

SCIRE FACIAS WOULD AFFORD NO ADEQUATE REMEDY AS MEANS OF INQUIRING into the manner in which a grant had been issued, as it only reaches such matter as appears upon the face or within the body of the grant.

ENGLISH COURTS HAVE VERY SELDOM EXERCISED JURISDICTION TO CANCEL GRANTS. Under the practice followed in England in the issuing of

grants, the exercise of such jurisdiction by them would be much more warranted than in the case of our American courts.

COURTS HAVE NO JURISDICTION OF BILL to set aside a patent, which bill alleges that the complainants are the heirs of a certain person who "gave in for a draw" at a land lottery; that their devisor's name was improperly written; that a third person procured a grant to himself through the use of their devisor's name; and that the defendant had since purchased the land thereby acquired at sheriff's sale. This although defendant had purchased it with full knowledge of these facts.

BILL in equity, filed by Walker as the guardian of certain minor children, heirs of William H. Stephens, who died in his minority. The bill alleges that William H. Stephens "gave in for a draw" in a certain land lottery as Berry Stephens' orphan, he being the only child of said Berry. That the apostrophe after the letter "s" was omitted by the person receiving the draw, making the entry read, "Berry Stephens, orphan." That the orphan drew a certain piece of land, and that a grant issued to said Berry Stephens, orphan; that the land was afterwards sold at sheriff's sale as the property of one Holcombe; that it was purchased by defendant Wells, who now holds the grant. The bill prays that the grant be corrected. The bill was dismissed by the court below on demurrer, upon the ground that the court had no jurisdiction to grant the relief prayed. This ruling is the error assigned.

Walker and McDonald, for the plaintiff in error.

Wofford and Akin, for the defendant in error.

By Court, LUMPKIN, J. The bill alleges that Berry Stephens died, leaving a widow and one child, William Henry Stephens, who removed from Jefferson to Dooly county; that while living in the six hundred and thirty-third militia district of Dooly county, William Henry Stephens, the minor, gave in for a draw in the Cherokee land lottery as Berry Stephens' orphan; that he drew lot of land No. 228, in the thirteenth district of the third section of originally Cherokee, now Gordon, county; that in 1833 the widow of Berry Stephens intermarried with one Amos Lane, by whom she had three children, who are the complainants in the bill; that on the fifth of May, 1839, William Henry Stephens died, leaving the complainants as his only heirs at law; that the person receiving the draw of the said William Henry Stephens, by mistake or otherwise, omitted to insert the apostrophe at the end of the "s" in his name, so that the name as taken down on the list was "Berry Stephens, orphan," instead of "Berry Stephens' orphan." The bill charges that some

one unknown to the complainants procured a grant to be issued to Berry Stephens' orphan; that the land was sold at sheriff's sale as the property of one Absalom Holcombe, and purchased by Andrew J. Wells, who in 1846 went into possession of the same, and has remained in the occupancy thereof ever since.

The prayer of the bill is for the correction of the mistake in the grant, and for general relief. The bill was, upon motion, dismissed at the hearing for want of jurisdiction in the court, and this ruling is assigned as error. Is there equity in the bill, conceding the court had jurisdiction?

Suppose it be true that no such person as Berry Stephens' orphan ever lived in Dooly county, or anywhere else; and further admit that the bill does not charge that Holcombe bought of some one personating the grantee, but without notice of the fraud, would not his title be good? To maintain this bill, it was not only necessary to allege that Holcombe derived title through some fraudulent vendor claiming to be the grantee, but that he had notice of the imposture.

There is another question, however, which lies at the foundation of this controversy. Can the court go behind the grant and examine the equity asserted in the bill? This is a new point, never adjudicated by this court. We have repeatedly held that a mistake of this sort could not be shown by parol proof; and intimated that perhaps it might be done by a direct proceeding instituted for the purpose. But are there not inherent and insuperable difficulties in the way?

In England grants are issued by the lord chancellor, after affixing the great seal of the United Kingdom to them; and a record is made of them in the court of chancery. Consequently, when it is proposed there to vacate a grant, the writ of *scire facias* issues from the common-law side of the court of chancery, where the grant is enrolled, and is there adjudicated unless the pleadings terminate in an issue or issues of fact. If they do, the pleadings are made up in the rolls office, and the record sent into the king's bench, to be tried by a jury, where, on a verdict had, the judgment is rendered.

But in Georgia grants are enrolled in the office of the secretary of state, which is an establishment not only distinct from any of the courts of this state, but belonging to another and independent branch of the government.

Now a *scire facias* is always founded upon a record, and issues from and is made returnable to the court where the record is kept.

Without legislation, then, how can the courts acquire jurisdiction by process of *scire facias* over disputed questions relative to grants? That is not all: a *scire facias* only reaches such matter as appears upon the face or within the body of the grant. It would afford, therefore, no adequate remedy for cases like the present. In some of the states provision has been made to obviate the difficulty, at least in part. In North Carolina an act was passed, 1798, directing a copy of the grant from the secretary of state's office to be filed in the office of the clerk of the superior court, upon which a *scire facias* might issue calling upon the defendant to show cause why the grant improperly issued should not be annulled: Taylor's Rev., app.

As to proceeding by bill to cancel a grant, but few instances can be found in the British books; and some of these are of doubtful authority. In *Attorney General v. Vernon*, 1 Vern. 277 (1684), the defendant's counsel insisted that no precedent existed to repeal letters patent by an English bill in chancery. That it was *causa prima impressionis*. But the lord-keeper said: "The question was short—whether there be fraud or not. If a fraud, it was properly relievable in that court. It was not fit [he said] that such matter should be stifled upon plea." He therefore reserved the benefit of it till the hearing, because he "would not give any countenance to such a case."

The same case came up again, 1 Vern. 370, and like the case under discussion, was argued at great length and with much ability. Counsel for the defendants reaffirmed that no precedent could be found of a grant being destroyed by English bill; and they insisted upon the application of Littleton's rule, that what never was, never ought to be. But the court overruled the objection, and held that an English bill was the proper remedy in this case.

Lord Chief Baron Montague said that though there was no precedent of any such suit, yet all precedents had a beginning; and that it was the province and privilege of a court of chancery to create precedents; that the court must find out new ways to obviate the mischiefs of the age, for *crescit in orbe dolus*.

Lord Chief Justice Jones said the pleadings in the case being very long and the proofs voluminous, he would not, having but an old decayed memory and wanting the use of hands, which might in some measure supply that defect, repeat all the circumstances of the case; but in a few words would deliver his opinion. He was sorry that Colonel Vernon, an honest gentleman and of known loyalty, should be the occasion of making a precedent of

this nature; but there was a time when all precedents began; and as much huddle and haste had been used in passing this grant, he thought his lordship might very well decree the patent to be delivered up and canceled.

Lord Chancellor Jefferies said he was clear that had this patent passed ever so regularly, yet the court of chancery might have decreed it to be delivered up. He said he could wish the crown had not parted with so many flowers, as he was persuaded there would not have been so many rebellions. And although Colonel Vernon was an honest gentleman of good quality, still the honor of Tutbury was of that vast extent, and so many nobleman had it, that it was not fitting for a person of Colonel Vernon's degree.

Chancery in England not only decrees the revocation of patents, but to amortize letters of reprisal, and to scold the Dutch ambassador upon the back of it, by the chancellor's saying that he "never came into the king's presence but that he was making fresh complaints:" See *Rex v. Carew*, 1 Vern. 54.

If this power be doubtful even in England, where the lord chancellor is the sole judge of the common-law branch of the court of chancery, in which all grants are made, and the making of grants by the chancellor is considered an act of the court of chancery, by which the court makes a record of the king's grants, how can this jurisdiction be exercised in this state where the courts have no connection with nor power over the record of grants?

One member of this court, at least, holds that inasmuch as the governor of Georgia has authority to issue grants, he alone must be the judge of the sufficiency and regularity of the various preliminary steps required to be taken toward the completion of a legal title, and to see that these prerequisites have all been complied with; and that the acts of the executive, in this respect, are as conclusive as the statutes of the legislature or judgments pronounced by courts of justice.

Without admitting this proposition to the extent stated, which I do not, but on the contrary, entertaining no doubt but that there are cases where the validity of the grant is necessarily examinable, both at law and in equity, and moreover, holding, as I do, that cases may arise where equitable rights, originating before the date of the grant, may be inquired into, still I have taxed my ingenuity in vain to discover what relief to grant in the present case.

The cancellation of the grant would vest the title in the state, and not in the complainant. A conveyance from Wells, the tan-

ant in possession, might or might not afford redress, because it does not appear from the bill that Wells' title is deducible from Berry Stephens' orphan, the grantee. Even if it did, before rendering such a decree, or indeed any other, should not the state, by its proper officer or agent, be made a party? And is not special legislation needed for just such a case?

The act of 1827, Cobb's Dig. 657, does not embrace this case. It extends only to the correction of errors which have occurred in some of the offices in the executive department in the issuing of grants; whereas this mistake is alleged to have been made by the person originally registering the names of the drawers in the six hundred and thirty-third district of Dooly county.

The act of 1827, Cobb's Dig. 656, makes provision for just such cases as this in the counties of Lee, Muscogee, Coweta, Troup, and Carroll; and the act of 1828, Id. 657, contains a similar provision for the bad spelling and transcribing of the names of persons entitled to draws in Dooly, Houston, Monroe, Henry, and Fayette.

But as yet no act has been passed for Cherokee, where this land was located, for any one of the ten counties into which it was subdivided.

Upon the whole, we think the court was right in refusing to exercise jurisdiction in the case made.

Sykes v. McRory, 54 Am. Dec. 402, was a case in which the court intimated that jurisdiction to correct a grant might be exercised by it, and held that a grant could not be impeached in a collateral way at law by showing that the grantee named in the grant was not the one intended, but that it should be first corrected by a *scire facias* or other proceeding in chancery. The court also held an order of the executive correcting a grant, after the intervention of the rights of third parties, to be inoperative and void. The principal case is cited and followed in *McRory v. Sykes*, 20 Ga. 571, to the point that a mistake in a grant cannot be rectified by *scire facias*. It is also cited in *Parker v. Hughes*, 25 Id. 376, to the point that a grant from the state cannot be set aside in a proceeding to which the state is not a party. In a subsequent action of ejectment between the parties to the principal case, the court held that parol evidence was admissible to show that the name "Berry Stephens, orphan," should have been "Berry Stephens' orphan."

PRINTUP v. MITCHELL.

[17 GEORGIA, 558.]

PAROL CONTRACT ALLEGED IN BILL, WHICH IS DENIED BY ANSWER thereto, may be established by parol evidence; the answer may be contradicted by evidence *alibi*.

IN DEPOSITION, WITNESS MAY ANSWER CROSS-INTERROGATORIES BY REFERENCE to his answers to the direct questions.

WITNESS SHOULD BE PERMITTED TO TESTIFY AS TO "HIS UNDERSTANDING" of what he heard certain parties say in relation to an agreement between them.

ANY ALTERATION OF WRITTEN INSTRUMENT WILL BE PRESUMED TO HAVE BEEN MADE AT TIME OF ITS EXECUTION; but the question whether there has been any alteration, and the nature thereof, is for the jury.

AFTER EXECUTION OF INSTRUMENT HAS BEEN PROVED IN USUAL MANNER, court should admit it in evidence, regardless of any apparent alterations upon it, the nature of which should be passed upon by the jury.

RECEIPT OF PARTY WHO IS HIMSELF COMPETENT WITNESS is hearsay evidence, and inadmissible.

DECLARATIONS OF PARTY AT WORK UPON BUILDING, THAT HE WAS WORKING FOR M., are admissible in evidence, as part of the *res gestae*, as tending to show that he had no interest in the building.

DECLARATIONS.—The admissibility of, generally, discussed.

SPECIFIC PERFORMANCE—EQUITABLE JURISDICTION.—Plaintiff sued to recover the value of labor performed in erecting a building upon defendant's lot. Defendant files a cross-bill for an injunction, alleging that plaintiff had agreed to build the house in consideration of the moiety of the property, and prays that plaintiff be decreed to take a conveyance according to his agreement: Held, that specific performance of this agreement cannot be decreed; also, that the injunction should not be granted, as, provided defendant can establish this agreement, it is a good defense at law.

VENDOR CAN SELDOM ASK INTERPOSITION OF COURT OF EQUITY to specifically enforce a parol contract. He must show that he will be prejudiced by its non-performance, as that the vendee had been given and has retained possession.

BILL FOR INJUNCTION HAVING BEEN IMPROPERLY RETAINED, WILL NOT BE FURTHER RETAINED for the purpose of granting other relief for which there is a remedy at law.

EQUITY WILL NOT TAKE COGNIZANCE OF ACCOUNT unless it is so complex, etc., that it cannot be arranged in a court of law.

ADMISSIONS.—Admissions should be clearly proved, deliberately made, and precisely identified, in order to be good evidence; but hasty and inadvertent verbal admissions, however clearly proved, are entitled to little consideration.

PAROL CONTRACT FOR LAND SHOULD BE PROVED by clear and indisputable evidence, leaving no reasonable doubt as to its terms.

THIS was a proceeding in equity which grew out of the following transactions: An action at law was commenced by J. J.

Printup against D. R. Mitchell, in which plaintiff claimed two thousand dollars alleged to be due him on account of labor performed and materials furnished in enlarging and repairing the Buena Vista house, in the town of Rome, which house belonged to defendant and was situated on his lot. This bill was then filed by Mitchell, for an injunction against the further prosecution of the above action, he alleging therein that he and Printup had made an agreement by which Printup was to become the owner of half of the property above mentioned in consideration of his doing the work sued for; that while the work was in progress Mitchell had advanced to Printup the sum of one thousand eight hundred dollars; and that since the completion of the building Mitchell had received eight hundred dollars in rents. The prayer of the bill was for an accounting, that the property be divided, and that Printup be decreed to take a deed for the share of the property alleged to be his. In defendant's answer to this cross-bill he denied the existence of the contract therein alleged. Defendant made two several motions to dismiss the cross-bill for want of equity, one at the commencement of the trial, and one at the close of the trial, and the motion was denied in each instance. At the trial defendant made several points, the following of which were noticed by the court. He objected to testimony of T. V. Smith and other witnesses being admitted to prove the parol agreement or contract alleged in the bill, upon the ground that its existence had been denied by his answer. He objected to the introduction of the interrogatories of certain persons, upon the ground that the cross-interrogatories were answered only by reference to the answers to the direct questions. He objected to the court's permitting the witness Younge Mann to testify as to his "understanding" of what the parties had said in regard to the contract above alleged. He objected to the court's allowing certain receipts to go to the jury, upon the ground that they appeared upon their face to have been altered. The court refused to admit in evidence a certain receipt signed by James McAmis, as he had been a witness in the case by interrogatories, and defendant excepted. All of the above rulings defendant now assigns as error. The remaining facts appear from the opinion.

J. W. H. Underwood, for the plaintiff in error.

Alexander and Akin, for the defendant in error.

By Court, LUMPKIN, J. If the defendant denies the existence of the parol contract sought to be performed, and insists

upon the benefit of the statute, can the case be made out by parol evidence? This is the first point presented in the bill of exceptions, and is, we concede, a vexed question.

There is high authority for holding that the bar to a decree is complete under such circumstances; but we think the more modern practice and the better doctrine is to allow the answer to be contradicted and overcome by *aliunde* evidence. To allow the answer to go uncontradicted is to furnish too strong a temptation to perjury by making it the interest of the defendant in every case to deny the agreement; since, if confessed, he would be bound to perform it. It seems to us that the rule once established, that the defendant is bound to confess or deny the agreement, and about which there is no longer any dispute, it must follow, as a necessary consequence, that where the agreement is denied the answer is liable to be contradicted by parol proof. And this disposes of the objection made to the testimony of T. V. Smith and others.

Certain depositions were objected to because the witnesses did not answer the cross-interrogatories, except by reference to their answers to the direct questions. This practice has been generally followed in our courts, and we see no objection to it upon principle. If the direct and cross questions are precisely the same, why should the answer to the latter be repeated in *totidem verbis*? Should the interrogatory be varied, or contain some additional inquiry, the answer of course should be adapted to the new phase in which the question is propounded.

The testimony of Younge Mann was objected to, because he only testified as to his "understanding" of what passed between the parties relative to the agreement. This species of evidence was held to be admissible by this court in *Moody v. Davis*, 10 Ga. 403.

Another exception is that the receipts of Mrs. M. A. Choice, Mr. W. C. Butler, and Mr. James McAmis were allowed to go to the jury without explanation, the defendant objecting to them on the ground that they appeared upon their face to have been altered. In ancient times, when few could write, and when the business which required writing was done by those who were skillful, where an instrument was suspicious by reason of any apparent alteration, the court took it upon itself to decide, upon an inspection of the paper, that it was void: Co. Lit. 35, note 7. But such a principle could not long be supported. And the rule may now be thus stated: an alteration of a written instrument, if nothing appear to the contrary, should

be presumed to have been made at the time of its execution. But generally the whole inquiry, whether there has been an alteration, and if so, whether in fraud of the defending party or otherwise, to be determined by the appearance of the instrument itself, or from that and other evidence in the case, is for the jury.

The court, upon the usual proof of the execution of the instrument, should admit it in evidence, without reference to the character of any alterations upon it, about which the court will presume nothing, leaving the whole question to be passed upon by the jury: *Leyfield's Case*, 10 Co. 92; Co. Lit. 225 a; *Master v. Miller*, 4 T. R. 338; *Van Horne's Lessee v. Dorrance*, 2 Dall. 306; *Steele's Lessee v. Spencer*, 1 Pet. 560; *Bowers v. Jewell*, 2 N. H. 543; *Beaman v. Russell*, 20 Vt. 205 [49 Am. Dec. 775]; *Bailey v. Taylor*, 11 Conn. 531 [29 Am. Dec. 381]; *Wilson v. Henderson*, 9 Smed. & M. 875; *Hudson v. Reel*, 5 Pa. St. 279.

The defendant offered a receipt given by James McAmis to J. J. Printup, to the following effect: "Received of J. J. Printup twenty-five dollars, in part payment, as per contract with D. R. Mitchell, for work done on the Buena Vista house," etc. McAmis himself being a competent witness, his receipt was hearsay evidence, and therefore properly ruled out by the court.

The court rejected the sayings of defendant, while employed on the work, as to whom he was doing it for. We are of the opinion that the declarations made by Mr. Printup, while engaged in putting up the improvements, that he was doing the work for Mr. Mitchell ought to have been admitted in his favor. They were connected with the principal fact under investigation. They were made at a time and under circumstances when it was not the interest of the declarant to disparage his title to a moiety of the lot. These declarations and conversations show the true opinion and state of mind of Mr. Printup at that particular period. They are parts of the *res gestae*. Where a person changes his residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or does any other act material to be understood, his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded, say the authorities, as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof like any other material facts: See 1 Greenl. Ev., 6th ed., sec. 108, note 1, and the cases there cited.

It is now well settled that the declarations of the possessor of land that he is tenant to another are admissible as evidence, because made against the interest of the party. But Mr. Greenleaf suggests that no good reason can be assigned why every declaration, if made in good faith, and under circumstances calculated to create no suspicion of its sincerity, should not be received as a part of the *res gestae*, leaving its effects to be governed by other rules of evidence. And he refers to numerous precedents, English and American, in support of the proposition: 1 Greenl. Ev., 6th ed., sec. 109, note 4. It has been held that a statement made by a person not suspected of theft, and before any search made, accounting for his possession of property, which he is afterwards charged with having stolen, is admissible in his favor: *Regina v. Abraham*, 2 Car. & K. 550. And letters written during absence from home are admissible as evidence explanatory of the motive of departure and absence, the departure and absence being considered as one continuing act: *Rawson v. Haigh*, 2 Bing. 99, 104.

To make these declarations evidence, they must be concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of co-existing motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct: 1 Greenl. Ev., sec. 110.

A motion was made to dismiss the bill at the beginning of the trial, and repeated when the testimony was closed. And the refusal of the court to grant the motion is assigned as error. What are the facts? Joseph J. Printup sues at law to recover of D. R. Mitchell for work and labor done and performed and materials found in the improvement of his premises in Rome. Mitchell files his bill, in which it is alleged that this pretended indebtedness originated on a parol contract between Printup and himself, to the effect that upon the completion of the improvements upon the Buena Vista lot by Printup he should be entitled to a conveyance from Mitchell to a moiety of the property. It charges that the improvements have been finished, and prays that Printup may be decreed to take a deed, and that his action at law be perpetually enjoined. Can a bill for specific performance be maintained under such circumstances? The old practice, it is said by some writers, in courts of equity, was in all cases, first, to send the parties to law to ascertain whether there was any remedy there or not. And provided there was no remedy at law, then equity would interpose. To sustain this bill,

this ancient rule would have to be reversed. And the interference of equity would be invoked in all cases in the first instance, notwithstanding the remedy at law was full and complete.

It is exceedingly difficult at all times for the vendor to ask the interposition of a court of equity to enforce a parol contract. Chancery will sometimes grant relief, especially where possession has been given and retained by the vendee. In *Buckmaster v. Harrop*, 7 Ves. 341, the court say: "The vendor had no prejudice. He had done nothing to entitle him to say the non-execution was a fraud upon him. Had he let Barlow into possession, that would be an act by which he might have had a prejudice. I am aware there are cases that acts done by the defendant can be made a ground for compelling him to perform the agreement, but it is difficult to bring these cases to bear; for what do such acts amount to when there is no prejudice to the plaintiff? Only to proof of the existence of the agreement. But the court does not profess to execute a parol agreement merely because it is satisfactorily proved." In the case before us, it may be fairly inferred from the proof that possession never was given by Mitchell to Printup, only as contractor, to enable him to make the improvements. There is not a scintilla of evidence that he ever held the lot one hour as purchaser. One thing is certain, the occupancy by him has long since been abandoned, and the premises are entirely under the control or at the disposal of Mr. Mitchell. What more does he want? The property has been paid for by Printup. Mitchell holds it, and his complaint is that Printup perseveringly refuses to take a title to half of it. And he prays chancery to lay its hands upon him, and compel him, *nolens volens*, to take a conveyance!

It is said in the argument that equity, having obtained jurisdiction for the purpose of the injunction, will retain it to administer the relief sought. But the obvious reply to this is that the injunction to stay proceeding at law should never have been allowed, the defense at law being complete. And this being so, it cannot be resorted to as a pretext for holding on to the bill for specific performance—two wrongs cannot make a right.

Again: it is contended that the bill should not be dismissed, as it will serve to adjust the unsettled accounts between the parties. To make this ground tenable, it should further appear that the accounts cannot, owing to their complexity, or some other special cause, be arranged in a court of law. Nothing of this sort is pretended. There is no foundation left to support this bill; indeed, it is rather an extraordinary proceeding.

Not only does Mitchell remain in the undisturbed and undisputed ownership and occupancy of the property, a moiety of which, if the averments in the bill are true, has been bought and paid for by Printup, but he has in his hands some eight hundred dollars coming to Printup as his share of the net proceeds arising from the rents, issues, and profits of the lot!

What is to be the practical result of this decision? Mitchell sets up this special contract, as he is entitled to do, viz., that the work and labor were done and the materials furnished by Printup in consideration that he, Mitchell, would convey to Printup one half of the improved lot. If he can prove his defense, he defeats a recovery at law. He holds a demand against Printup for upwards of eighteen hundred dollars for money advanced to enable Printup to carry on the job. He not only prevents a finding for Printup, but he gets a judgment against him by way of a set-off for this counter-claim. He then has the Buena Vista house, the eight hundred dollars coming to Printup as his share of the rent, has defeated his suit at law, and obtained a judgment against Printup for more than eighteen hundred dollars! Ought not this to satisfy Mr. Mitchell? Can he reasonably desire more? All that I have said proceeds upon the supposition, of course, that Mitchell will establish by proof the case made by his bill; if he cannot at law, he would have failed in equity; but whether he can or cannot will make no difference as to his equity. And now the position of parties will be changed. Printup will file his bill for specific performance and for account; Mitchell will repudiate the agreement, and insist that the complainant be held to strict proof thereof. He will refer to the answer of Printup to his bill, flatly denying that any such contract ever existed; and with a deference for his adversary never before manifested, will insist that the jury shall believe him in preference to himself. Printup will exhibit the sworn bill of Mitchell, and with a self-distrust truly amiable contend that the jury shall give full faith and credit to his opponent. How the parties shall extricate themselves from this dilemma we will not anticipate, but leave it to the ingenuity of their able counsel to point out a way when the exigency shall arise. Sufficient unto the day, etc.

Before concluding, we propose to notice briefly two points in the charge of the presiding judge. In commenting upon admissions, he remarked that when clearly established they were entitled to high consideration. Knowing, as we do, the danger of this species of evidence, we think it best not to

relax any of those rules which are designed to guard it against abuse. It is not only necessary that the declarations should be clearly proved, but they should, say the books, be deliberately made and precisely identified: *Rigg v. Curgenvan*, 2 Wils. 395, 399; *Glasford on Ev.* 326; *Commonwealth v. Knapp*, 9 Pick. 507, 508 [20 Am. Dec. 491], *per Putnam, J.*

Indeed, verbal admissions, hastily and inadvertently made, however clearly established, should have little or no binding efficacy: *Salem Bank v. Gloucester Bank*, 17 Mass. 27; *Barber v. Gingell*, 3 Esp. 60; *Smith v. Burnham*, 3 Sumn. 435, 438, 439; *Cleaveland v. Burtons*, 11 Vt. 188. It is unquestionably true that while all experience teaches that verbal declarations should be received with great caution, subject as they are to much imperfection and abuse, still they exert, usually, a most controlling effect upon the minds of the jury.

Our learned brother instructed the jury to weigh the evidence, and render a verdict accordingly. A parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement. It is a serious matter to substitute a parol sale of real estate for a deed.

The decree of the circuit court is reversed.

ANSWER TO BILL IN EQUITY AS EVIDENCE, AND HOW CONTRADICTED:
Commonwealth v. Cullen, 53 Am. Dec. 450, and note 473; *Zeigler v. Scott*, 54 Id. 395, and note 400.

ANSWER TO INTERROGATORIES IN DEPOSITION.—A case almost identical with *Printup v. Mitchell*, both in fact and in law, upon this question, is *Louden v. Blythe*, 55 Am. Dec. 527. The deponent in this case answered one of the interrogatories: "I have stated all the facts within my knowledge in the preceding answers that would be of service to either party." This was held sufficient.

ALTERATION OF WRITTEN INSTRUMENT.—Whether an instrument has been altered or not is a question for the jury: *Bliss v. McIntyre*, 46 Am. Dec. 165, and note collecting all the previous cases in this series. The inquiry whether an instrument has been altered, and if so, whether in fraud of the defending party or otherwise, to be determined by the appearance of the instrument itself, or from that and other evidence in the case, is for the jury; the whole is matter of fact, and the jury must determine it from the evidence before them: *Beaman v. Russell*, 49 Id. 775. In this case the question is discussed at length.

DECLARATIONS AS EVIDENCE: See *Bradley v. Spofford*, 55 Am. Dec. 205; *Gilbert v. Gilbert*, 58 Id. 268; *Wetmore v. Mell*, 59 Id. 607; *Nelson v. Iverson*, 60 Id. 442; *Frink v. Coe*, 61 Id. 141, and the notes to these cases.

ACCOUNT.—One of the grounds upon which equity will exercise jurisdiction to decree an accounting, according to a late eminent author, is "where the accounts are all on one side, but there are circumstances of great compli-

cation, or difficulties in the way of adequate relief at law;" 3 Pomeroy's Eq. Jur. 472, citing the principal case. Specific performance of parol agreement for sale of land, upon the ground of part performance, will not be decreed unless the facts alleged to be in part performance be clearly proved; and the contract itself, as alleged in the bill, should be established by clear and definite testimony: *Aday v. Echole*, 52 Am. Dec. 225; *Robbins v. McKnight*, 45 Id. 406; *Hudson v. Layton*, 48 Id. 167; *Johnston v. Glancy*, 28 Id. 45, and notes to above cases.

WHERE MATERIAL ALTERATION IS MADE in an instrument in a different handwriting from that in which it is written, and a plea of *non est factum* is filed, it is error to instruct the jury, in such a case, that the law presumes the alteration was made at the time the instrument was executed. The law presumes nothing in such a case, but leaves the whole question to be passed upon by the jury: *Planters' & Mechanics' Bank of Dalton v. Ervin*, 31 Ga. 371. *Thrasher v. Anderson*, 45 Id. 539, is an interesting case upon the question of alteration of written instruments. In each of the above cases the principal case is cited; it is also cited *arguendo* in *Patterson v. State*, 47 Id. 528, where the court say that "to allow the witness to state the deductions drawn by him from the conversation is at once to trench upon the province of the jury, and to transform the witness *pro hac vice* into a juror."

HAWKS v. PATTON.

[18 GEORGIA, 52.]

LIBEL AND SLANDER—EVIDENCE—GENERAL RULE THAT WITNESS MUST STATE FACTS, and not his inference from them, seems to have an exception in cases of libel and slander, as the injury done in such cases depends upon the effect the words produced in the minds of hearers; and the way to determine this effect is to find out how the words were understood by hearers.

IT IS NOT ERROR FOR COURT TO ALLOW AMENDMENT to the declaration, in cases of libel and slander, striking out the original words, and inserting other words varying in terms, though amounting very much to the same in import, after the jury had been charged that the words proved would not sustain the declaration. Such amendment would not present a new cause of action.

SLANDER against William H. Hawks by Matthew J. Patton.
The opinion states enough of the facts.

T. R. R. Cobb, for the plaintiff in error.

T. W. Thomas, for the defendant in error.

By Court, STARNES, J. The general rule is well settled that a witness must state facts, and not his inferences from them. And where conversations to which he has listened are proper evidence, he must state the words used, as near as he can recollect them, and leave the court and jury to determine the accurate meaning and signification of these words, unless, indeed, they

be technical words or terms of art. But in cases of libel and slander something of an exception seems to have been made to this rule; and as the injury done depends upon the effect which the words have produced in the minds of the hearers, it has been held that we can ascertain this effect only by finding what was their understanding of the words used. If nothing injurious to the character of the plaintiff was understood to have been said, of course no damage to him had resulted.

This is said to be the reason for the rule. It is perhaps a very good reason; for whatever may have been the understanding of the witnesses as to the meaning of the words used, no harm can come to the defendant, unless it be proved to the satisfaction of the jury that the words were used maliciously; that is to say, that the defendant intended, by the use of these words, wrongfully to impute the crime in question to the plaintiff.

We find the rule to which reference is made laid down in the early case of *Fleetwood v. Curly*, Hob. 267, where it is said that "where words have two meanings, and the hearers understood them in an actionable sense, the action is maintainable, for the slander and damage consist in the apprehension of the hearers." In *Button v. Heyward*, 8 Mod. 24, the court says that in cases of action for words, "we are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and admit of two interpretations, we ought to construe them *in mitiori sensu*," etc. In the case of *Rex v. Horne*, 1 Cowp. 687, the court of king's bench held that "as the crime of a libel consists in conveying and impressing injurious reflections upon the mind of the subject, if the writing is so understood by all who read it, the injury is done by the publication of these injurious reflections before the matter comes to the jury," etc. See also *Du Bois v. Beresford*, 2 Camp. 512; 2 Stark. Ev. 461. According to this rule, the court properly admitted the testimony of James G. Thomas.

After the case was submitted to the jury, the court instructed that body that the words proved would not sustain the declaration. The counsel for plaintiff then moved an amendment, which was allowed by the court; and this is assigned as error. The action had been framed according to the new forms in the act of 1847. The amendment proposed to strike out the words alleged in the original declaration, and insert what is equivalent to a *colloquium* (other words varying in terms, though amounting very much to the same in import as those originally set forth),

together with appropriate innuendoes. It was objected that this could not be done; that it was allowing a new cause of action, and that such an amendment could not properly be made to the statutory form adopted. It is our opinion that the matter of this amendment did not present a new cause of action. It plainly refers to the same conversation alluded to in the original petition, varies the terms in which the words are stated, but by a *colloquium* and innuendoes sets forth that which, being very much the same in import, was obviously the same transaction. It was therefore a legitimate subject-matter for an amendment. We are also of the opinion that the statutory form might in this way be amended. And we do not agree with the suggestion that the legislature intended that this form should be appropriate to such words only as were of a slanderous signification, without the aid of a *colloquium* and innuendoes. We think that the legislature intended to do what was reasonable and sensible in furnishing these forms; we desire in this spirit to construe the act and give effect to it, and we believe that it may be thus made quite useful.

So far as the form goes, it must be followed, and there must be no material variation from it. But when the blanks which it contemplates are to be filled, they may be supplied with such appropriate matter as, falling within the scope of the statutory direction, is yet fit and proper to set forth the cause of action plainly and distinctly. The form which this statute prescribes for the action of slander is as follows: "The petition of A. B. sheweth that C. D., of said county, has damaged your petitioner in the sum of — dollars, by falsely and maliciously saying of and concerning your petitioner, on the — day of —, the following false and malicious words." Here following, the statute directs the alleged slanderous words to be inserted. Now, why is it not entirely reasonable and proper that the words should be then written with such explanatory allegations or innuendoes as serve to make clear and distinct the nature of the injury concerning which complaint is made? We think we are carrying into effect the intention of the legislature when we hold that this may be done. We are sure that in so deciding we are prescribing a simple and sensible rule.

Let the judgment be affirmed.

COMPETENCY OF TESTIMONY AS TO HOW WITNESSES UNDERSTOOD LUMINOUS MATTER.—Upon this subject the authorities are very contradictory, as will be seen by an examination of note to *Miller v. Butler*, 52 Am. Dec. 770.

WORDS TO BE TAKEN AS UNDERSTOOD BY HEARERS: *Watson v. McCarthy*, 16 Am. Dec. 380. Witness cannot state what meaning they understood to be conveyed by the words: *Snell v. Snow*, Id. 730, and *Maynard v. Boardley*, 22 Id. 595.

QUESTION DECIDED IN PRINCIPAL CASE IS DISCUSSED in note to *Vass Vechter v. Hopkins*, 4 Am. Dec. 352, where authorities are collected and commented upon.

KEENER v. STATE

[18 Georgia, 194.]

OMISSION TO CHALLENGE JUROR AT TIME HE IS IMPANNELED is a waiver of any objection to him, and his competency cannot afterward be questioned by the party making such omission. This doctrine applies to both civil and criminal cases.

DEFENDANT IN CRIMINAL ACTION CANNOT OBJECT TO WITNESS for the state on the ground that no notice of such witness had been given him, and that his name did not appear in the list of witnesses sworn before the grand jury, under a statute requiring that the defendant in a criminal cause shall be furnished before arraignment with "a list of the witnesses who gave testimony before the grand jury."

CONSTRUCTION OF STATUTE—INTENTION OF LEGISLATURE is to be gathered from the words used, taken in their plain and obvious sense.

WITNESSES CANNOT GIVE THEIR OPINION as to whether the defendant, being tried for murder, would be caused to look for difficulty from the manner, language, and tone of voice of the deceased just previous to the homicide. They must testify what the manner, language, and tone of voice were.

GENERAL CHARACTER.—The following are proper questions to witness in a case of homicide, to establish the general character of the deceased for violence in a particular place: "Are you acquainted with the general character of the deceased for violence in the particular place where the difficulty occurred?" and, "What was the character of the deceased for violence in that particular place?"

THREATS OF DECEASED PRIOR TO TIME OF HOMICIDE, uncommunicated to the defendant, may be introduced in evidence to show the state of feeling entertained by the deceased toward the accused; but cannot be introduced by the defendant as a justification of the homicide, unless he shows that such threats were brought to his knowledge prior to the act. The remoteness or nearness of time as to the threats, pointing to the act subsequently committed, makes no difference as to the competency of the testimony.

IF THERE IS ANY EVIDENCE, IN CASE OF HOMICIDE, upon which the jury might have mitigated the charge from murder to a lower offense, or if there is any evidence which would leave any doubt whether the defendant acted with malice or had not been actuated by principles of self-preservation, then the defendant is entitled to have the jury instructed as to the different degrees of homicide, and what constitutes each.

IT IS DUTY OF JUDGE TO DECLARE TO JURY WHAT LAW IS, WITH ITS EXCEPTIONS AND QUALIFICATIONS, AND THEN STATE HYPOTHETICALLY THAT IF CERTAIN FACTS WHICH CONSTITUTE THE OFFENSE ARE PROVED TO THEIR SATISFACTION THEY WILL FIND THE DEFENDANT GUILTY, OTHERWISE THEY WILL ACQUIT HIM.

JURY, IN CASE OF HOMICIDE, ARE THE JUDGES OF BOTH THE LAW AND THE FACT, AND NO LAW WHICH THEY ARE ENTITLED TO CONSIDER SHOULD BE WITHHELD FROM THEM BY THE COURT IN ITS CHARGE.

TO MAKE LEGAL VERDICT, IN CASE OF HOMICIDE, THE JURY MUST FIND THE CONCLUSION OF LAW UPON THE FACTS; AND NOTWITHSTANDING IT IS THEIR DUTY TO RECEIVE A CHARGE FROM THE COURT, STILL THE CONCLUSION MUST BE THE RESULT OF THEIR OWN CONVICTION AND UNDERSTANDING.

INDICTMENT AGAINST HENRY C. KEENER FOR MURDER IN THE KILLING OF JAMES REESE. THE FACTS NECESSARY TO THE POINTS DECIDED ARE CLEARLY SET OUT IN THE OPINION.

T. W. Miller and A. H. Stephens, for the plaintiff.

Shewmake, attorney general, for the state.

By Court, Lumpkin, J. We propose to consider the grounds of error complained of in this case in the order in which they are presented in the assignment; and the first is, that the court did not set aside Samuel A. Verdery, but allowed the attorney general to put him upon the prisoner as a competent juror.

When the name of Samuel A. Verdery, was called, he was put upon his *voir dire*; and in answer to the question, "Have you, from having seen the crime committed, or having heard any portion of the evidence delivered on oath, formed and expressed any opinion as to the guilt or innocence of the prisoner at the bar?" said juror announced that he had not, but that he had formed and expressed an opinion from what he had heard of the case. He answered the other questions propounded by the statute negatively. The attorney general pronounced the juror competent, and he was accepted and sworn in chief to try the cause.

Whether Mr. Verdery was a competent juror, we are not called upon to decide. True, he was pronounced qualified by the state's attorney, but not by the presiding judge. His opinion as to whether or not the juror stood indifferent was not invoked; and yet it was the only judgment which this court is authorized to review. There has been no decision by the court below upon this point. Not only was no attempt made by the prisoner to get rid of the juror by making the question to the judge, but he failed to put him upon triers, to test his competency, as he was entitled to do under the act of 1843. He accepted the juror as he was, and consented without objection that he should be

sworn in chief to try the traverse. And it is a maxim of the English law, as well as of common sense, that no one can take advantage of a wrong which he himself agreed to.

This doctrine underwent a thorough investigation by the judges in convention in *Glover v. Woolsey*, Dudley (Ga.), 85. It is true, that was an action of *assumpsit*; but the reasoning of the convention, as well as the authorities cited, apply to criminal as well as civil causes. It is there laid down as a well-settled rule that an omission to challenge a juror before trial is a waiver of the objection to him; and that it would be most unreasonable to allow a party the benefit of a verdict, if favorable to him, and the benefit of a new trial on account of the objection if the verdict should be adverse. In one of the cases referred to, *Jeffries v. Randall*, 14 Mass. 206, the court say: "Had the defendants made the requisite statutory inquiry, and failed of discovering the fact, which would have disqualified the juror, it would have been equitable to have granted relief at this stage of the proceeding; but having omitted to avail themselves of their rights when the jury was impaneled, the motion cannot now obtain." And so we say in this case.

In the progress of the cause, the attorney general offered as an original witness on the part of the state one William A. Archer, whose name was not on the list of witnesses sworn before the grand jury, nor among those of whom the defendant had notice. Counsel for prisoner objected to said Archer's being sworn as an original witness on the part of the state, for those reasons. The court overruled the objection, and counsel for the prisoner excepted. It is insisted that Archer was incompetent to testify, and the seventh section of the fourteenth division of the penal code is relied upon for his exclusion. It is in these words: "Every person charged with a crime or offense which may subject him or her on conviction to death or imprisonment in the penitentiary for the term of three years or more shall be furnished, previous to his or her arraignment, with a copy of the indictment and a list of the witnesses who gave testimony before the grand jury." Cobb's Dig. 834.

In the case of *Stokes v. State*, 18 Ga. 17, recently determined at Milledgeville, this court held that the defendant was entitled only to a list of the witnesses who gave testimony before the grand jury. Such is the definite language of the code; and if ever the maxim that the express mention of one thing implies the exclusion of another is to have a practical application, no case can occur more palpable than this. True, a different con-

struction was put upon this clause by the late Thomas U. P. Charlton, judge of the eastern circuit, in *State v. Calvin*, R. M. Charl. 142, and the reason assigned was that, as one of the authors of the penal code, he was solicitous to place persons accused under our law upon as high a scale of dignity as was dictated by the wide difference between a citizen of a republic and the subject of a monarchy. Hence every person committing a felony in this state should be placed upon the same footing as a subject of England charged with treason. And that as by the statute of Anne a prisoner charged with treason was entitled to a list of all the witnesses to be produced, with their professions and places of abode, the like provision was incorporated with our code, the better to enable defendants, by inquiry into the characters of the witnesses, to make their defense.

However much we may admire the humanity of the motive which prompted this interpretation, we most respectfully submit that both the distinguished jurists who framed the code, as well as the legislature which adopted it, were most importunate [unfortunate] in the use of the terms employed, if the exposition of Judge Charlton be correct. And we coincide with his honor, Judge Holt, that it is not safe to inquire what the framer of the law thought when he drafted it, but what the legislature intended when they passed it; and that this intention is to be gathered from the words used, taken in their plain and obvious sense; and that it is very clear that all that was designed was to let the accused distinctly know, before arraignment, the charge brought against him, the prosecutor who preferred it, and the witnesses who gave testimony before the grand jury. This is all that is expressed. Had it been designed to limit the state, on the trial, to any particular set of witnesses, some words of restriction would have been used. Here there are no such words. The statute of Anne contains the words "a list of witnesses to be produced;" ours, "a list of the witnesses who gave testimony before the grand jury." How widely different the phraseology! And yet they are treated, in the decision to which we have referred, as not only the same in reason and principle, but one is considered but the re-enactment of the other. We affirm the judgment of the circuit court upon this point also.

As to the third ground: a witness, Goodwyn, introduced by the state on cross-examination, was asked "whether the tone of voice, with the language and manner of the deceased, at the time he walked through the piazza to the room in which the defendant was, was not such as to cause him to expect or look

for a difficulty." This question was not allowed to be put, but the witness was permitted to testify what the tone of voice, language, and manner of Reese at the time were, which he did. We regret that this question was not suffered to be propounded, because of its entire immateriality. Everybody at the house where this homicide was committed that night expected a difficulty, as a matter of course. There could have been but one answer to the interrogatory, and that would not have weighed a feather with the jury; and yet hours, perhaps, have been consumed first and last in discussing the rule of evidence applicable to the facts contained in the record. We subjoin the reasons given by the judge for rejecting this testimony in his own language.

"This question was not allowed to be asked, because the answer would not be as to a fact, but the expectation of a witness, arising out of a series of facts, either then in evidence, or capable of being put in evidence. Now, the expectation of the witness was nothing more than the deduction or conclusion of the mind of the witness as to the effect which these facts produced on his mind, and inferentially would be likely to produce on the mind of Keener. It is not for a witness to draw such conclusions; that belongs to the jury. This is the general rule of law, to which, however, there are exceptions: as in questions of sanity or insanity, art or science, and others of a like nature, in which the opinion of a witness, founded upon facts too multitudinous and minute to be presented to the mind of jurors, or of a skill, the witness's own, is admitted. There is another class of exceptions, founded chiefly on defect of memory, in which the witness may give his belief; such as questions of personal identity, handwriting, etc., and others in which he may state his impressions or understanding. Such were the cases of *Moody v. Davis*, 10 Ga. 403; *Fielder v. Collier*, 13 Id. 495. But the court does not find the case before it to be within any of the exceptions. The question asked the witness was as to what he expected from the conduct of Reese, which conduct was intended to be proved by the impression it made on his mind; or, as expressed by one of the counsel, a daguerreotype likeness of his conduct, as reflected from the mind of the witness, was wanted. It was certainly important to ascertain what was the conduct of Reese on that occasion, even to the minutest action. But the mirror from which it was sought to have it reflected may not have been true. There may have been the seams of credulosity, timorousness, passion, or prejudice to disturb the like-

ness; and which may have been very different from that which would have been made on the mind of the jury by a simple statement of facts."

Our brother, we believe, has stated with accuracy the rule as laid down in the books: 1 Greenl. Ev., sec. 440; and yet the writer from which it is taken cites with approbation the case of *McKee v. Nelson*, 4 Cow. 355 [15 Am. Dec. 384], in which it was held that in an action for breach of a promise to marry, a person accustomed to observe the mutual deportment of the parties may give in evidence his opinion upon the question whether they were attached to each other; and that too without it being made to appear that the witness was an expert in the affairs of the heart. The court admit the general rule as stated by Judge Holt, namely, that witnesses are not allowed to give their opinions to a jury, but suggest that there are a thousand nameless things indicating the existence and degree of the tender passion which language cannot specify and which cannot be detailed to a jury. Why, we would ask, may not the various facts which manifest the existence of attachment be as capable of specification as any other matter whatever? Why may not the existence of love as well as revenge, being both of them elementary principles of human nature, be proved by external signs and the multiplied exhibitions of its energy? There is no radical difference; and the rules of evidence should be the same as applicable to both of these master passions. If it be allowable to ask, as in the case of *McKee v. Nelson, supra*, whether in the opinion of the witness the parties were not attached to each other, it would seem to justify the inquiry whether the circumstances which surrounded the accused were not sufficient to excite the fears of a reasonable man. The defendant, however, is required to act upon his own judgment, and not that of another, and is responsible to the law for the soundness of his conclusion. And foreseeing, as we do, the indefinite multiplication of collateral issues to which any other doctrine would lead, we affirm the judgment of the court below upon this ground.

The place where Reese was killed was a brothel of notoriety in the city, and counsel for prisoner proposed asking the witness Prater whether he was acquainted with the general character of deceased for violence in the place where the difficulty occurred; and what was the character of deceased for violence in that particular place. Objection was made to each of these questions by counsel for the state, and the court refused to allow them to be asked. To which ruling the pris-

oner, by his counsel, excepted. And this constitutes the fourth error assigned. No authority was read for or against this point, except the case of *Boswell v. Blackman*, 12 Ga. 593, and that establishes this principle only: that where a witness is sought to be impeached, and is shown to have a general reputation for truth and veracity in the county of his residence, that may be considered the neighborhood in which he lives, for the purpose of satisfying the demands of the law. I took occasion when delivering the opinion in this case to state that for myself I was inclined to hold that the rejection of the questions, in the form in which they were put, was error; but that, in deference to the opinion of my brother Starnes, as well as to that of the learned judge who presided at the trial, I was content to affirm the judgment, with this distinct explanation: that it was competent to give proof as to the general conduct of the deceased for violence at this place—especially toward Keener—the testimony showing that they had long been rivals for the favor of the keeper of the brothel. Upon examination, I am satisfied that the questions propounded to Prater were in the proper form.

Mr. Greenleaf, in treating of the rule as to the admissibility of evidence of general character, concludes thus: "But it seems that the character of the party in regard to any particular trait is not in issue, unless it be the trait charged against him; and of this, it is only evidence of general reputation which is to be admitted, and not positive evidence of general bad conduct." And the author quotes Swift's Evidence, and numerous cases, English and American, to sustain this proposition: 1 Greenl. Ev., sec. 55, note. The particular trait involved in the issue here was the character of Mr. Reese for violence in this place; a circumstance relied on by Keener, in part, for his justification in committing the homicide. And it would seem that the character of the deceased for violence was to be established by general reputation rather than positive evidence of general bad conduct. Either mode of proof will be satisfactory to the defendant's counsel in the present case, provided we repudiate the doctrine, as we distinctly do, that a man may not have different general characters adapted to different circumstances and localities; that is, a character for rail-cars, and a character for the brothel; a character for the church, and one for the street; a character when drunk, and a character when sober. Instead of a doctrine like this being too loose for judicial investigation, we hold that it is in accordance with the soundest elementary principles. In

all cases where evidence is admitted, touching the general character of the party, it ought, manifestly, say the authorities, to bear reference to the nature of the charge against him. A schoolmaster is indicted for an assault and battery upon one of his pupils; he defends himself under his acknowledged right to inflict moderate correction. The charge puts in issue the character of the teacher for violence; and where, pray, would you go to ascertain that character—among his fellow-men, or in the school-room? There can be but one response to this question. An officer in the army or navy is tried for cruelty to a soldier or sailor: what has his reputation in the community generally to do with the trait of character involved in the issue? It is in the barracks and on board the man-of-war that we look for what we wish to learn. There are thousands of men in this country, mild as a May morning when sober, but demoniacs when drunk: have not such two distinct characters? Their moral identity is completely lost; their individuality metamorphosed under the maddening effects of alcohol. Philip drunk, and Philip sober, were altogether different persons. As a conductor, Mr. Reese was uniformly gentlemanly; at the brothel, he was menacing, turbulent, rash, reckless, and raging.

The case of *Quesenberry v. State*, 3 Stew. & P. 308, although not strictly applicable to the precise point which we have been considering, is, nevertheless, so pertinent to the case that I am induced to make the following quotation from the opening of the court, as delivered of Chief Justice Lipscombe: "That the good or bad character of the deceased, as an abstract proposition, can have no influence on the guilt of the accused, is too clear to admit of controversy. To murder the vilest and most profligate of the human race is as much a crime as if he had been the best, most virtuous, and the greatest benefactor of mankind; but there can be no doubt but that when the killing has been under such circumstances as to create a doubt as to the character of the offense committed, that the general character of the accused may sometimes afford a clew by which the devious ways by which human action is influenced may be threaded and the truth obtained. It is an acknowledged principle that if at the time the deadly blow was inflicted the person who so inflicts has well-founded reasons to believe himself in imminent peril, without having by his fault produced the exigency, that such killing will not be murder. If the deceased was known to be quick and deadly in his revenge of imagined insults; that he was ready to raise a deadly weapon on every slight

provocation; or, in the language of the counsel, his ‘garments were stained with many murders’—when the slayer had been menaced by such a one, he would find some excuse in one of the strongest impulses of our nature, in anticipating the purposes of his antagonist; the language of the law in such a case would be, Obey that impulse to self-preservation, even at the hazard of the life of your adversary.

“ If the killing took place under circumstances that could afford the slayer no reasonable grounds to believe himself in peril, he could derive no advantage from the general character of the deceased for turbulence and revenge; but if the circumstances of the killing were such as to leave any doubt whether he had not been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive of which he had been actuated. To this cause we can see no good objection; and it seems pretty certain that it would often shelter the innocent from the influence of that sound, but not unfrequently severe, maxim of law, that when the killing has been proved, malice will be presumed, unless explained and rebutted. There can be but little danger of the guilty escaping under the influence of a prejudice created by such testimony against the deceased. The discretion of the judge will be able to control and prevent such a result; and jurors will be able to comprehend the reason and object of such proof.”

The next error complained of is, that the court withdrew and excluded from the jury all the testimony of James Cosby. This witness testified that on Friday night, before the death of Reese, which was on the Sunday evening, he met Reese at the United States Hotel, who remarked to witness that he had not seen him on McIntosh street for a good while. Cosby replied that he had not been there for about ten months. Reese then said that he himself did not go there as frequently as he used to; that Keener had taken his woman from him; and he said that Keener was a damned coward, and that he had made him leave there two or three times; and that if Keener crossed his path he would kill him. He added, he was going out there before long, and would kick up hell. Nothing more was said. The testimony of Cosby was rejected, mainly upon the ground that the threats which it proves were made in a private conversation between Reese and witness, which was never communicated to Keener.

Without stopping to inquire whether the facts related by the

witnesses, apart from the threats, were not admissible, we prefer to confront the question directly; and to consider whether or not the evidence of Cosby, taken as a whole, should not have been received. Keener is indicted for killing Reese; his defense is that Reese manifestly intended, by surprise or violence, to take his life, or do him some bodily hurt; that the circumstances were such as to excite the fears of a reasonable man; and that he acted under the influence of those fears, and not in the spirit of revenge. The proof is, that two nights before the tragedy occurred Reese entertained the most deadly hostility toward Keener. Jealousy, another name for insanity, of the most malignant character, had taken possession of his bosom, and was shaking the throne of his reason to its very foundation. Keener had taken his woman from him; and if the damned coward ever crossed his path, he would kill him; he was going out on McIntosh street before long and would kick up hell there. Prophetic words! He sowed to the wind, and reaped the whirlwind. What a terrible lesson! Well might the wise man say of the house of the strange woman, "The dead are there!"

Ought not this conversation, whether communicated to Keener or not, to have been admitted as a substantive fact, to show the *malus animus*, or evil intent toward Keener, with which Reese went to that house that night? Laying aside all technical rules and reasoning, we ask, with the knowledge of the mind and feelings of the deceased disclosed by this witness, would we not, and ought not the jury, to listen more indulgently to the alleged apprehension of injury on the part of Keener, as well as to the facts and circumstances upon which he relies to justify his conduct? Do not these previous threats throw light upon Reese's conduct up to the time of the killing? Do they not serve to illustrate the transaction?

It is stated by Mr. Starkie, 1 Ev. 39, Mr. Roscoe, Ev. 74 et seq., and all the writers on evidence, that the general rule is that all the circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. This proposition is exceedingly broad, and if carried out in good faith would produce the most beneficial results. Accordingly, in *Richardson v. Royalton & Woodslock Turnpike Co.*, 6 Vt. 496, and *Davis v. Calvert*, 5 Gill & J. 269 [25 Am. Dec. 282], it was held that all facts upon which any reasonable presumption or inference can be founded as to the truth or falsity of the issue are admissible in evidence. In

addition to the precedents quoted by Mr. Roscoe to sustain the general rule of evidence above stated, we beg leave to refer to a few cases in illustration of the rule. The case from Vermont was this: An action was brought by the plaintiff for damages occasioned on account of the insufficiency of defendants' bridge, so that in passing with a drove of cattle some eighteen or twenty were precipitated into the river, and seven of these were so much bruised and wounded as to make it necessary to kill them. It was shown that the reach of the bridge which fell in had been erected about three years before the accident happened. The plaintiff further offered to prove that in 1831 the defendants built the two northern reaches of the said bridge anew, as the old ones had stood about nine years; and that the new reaches thus erected were stronger than the reach which fell in with the cattle. To the admission of this evidence the counsel of defendants objected. But the objection was overruled and the evidence admitted, as having a tendency to show that the defendants considered that the augmentation of business and the necessities of the community required a stronger bridge than the one first erected. The court admit that the testimony is not very important, but that in modern practice the evidence that is admitted to go to the jury is more natural, and not governed by rules so artificial as formerly. "Under the rule, then," says the judge, referring to that taken from Starkie, "did the evidence afford any reasonable inference that the southern reach of the bridge which broke was insufficient, because in 1831 the defendants built the two northern reaches stronger than the reach that did break? Does it tend to confirm the plaintiffs' testimony or weaken or contradict the defendants?"

In *Caldwell v. State of Connecticut*, 17 Conn. 467, it was decided that where an information for keeping a house of ill fame charged the offense as having been committed after the statute prohibiting it went into operation, and evidence was offered to prove that the house was reputed to be of ill fame previous to that time, such evidence was admissible as concurring to prove that it sustained the same reputation afterwards.

State v. Goodrich, 19 Vt. 116 [47 Am. Dec. 676], is almost identical with the case under discussion. Goodrich was indicted for discharging a gun at one Green, and wounding him; and the person injured was a witness on the trial; and it appeared that the affray took place on the premises of the defendant. Goodrich insisted that the assault and battery, if committed by him, was in defense of his person or property; and offered evi-

dence to prove that there had at previous times been fights between Green and himself; and that his house had been attacked, and his property, by a company of which Green was one; and that Green had frequently threatened violence upon his person. The court decided that it was not competent as a defense to this prosecution to inquire into the previous affrays and contentions between the parties; or to prove a previous threat by Green that he wanted to get some powder for the purpose of blowing up the house of the defendant. Redfield, J., in delivering the opinion of the supreme court, stated the question to be whether Green made the first assault, or whether Goodrich acted in self-defense. And after stating that it is not always easy to determine what is collateral to the main issue, the judge proceeds: "In the present case, if it was material to know with what intent Green went to defendant's house, that could only be shown by his acts, and his declarations in connection with those acts. As part of that intent, it might have been shown that he declared his intention to see if the hay remained; and we apprehend what is stated in the bill of exceptions in regard to the tendency of the testimony on the part of the state to show that he went there with that intent must have been derived, partly at least, from his declarations on the way and while there. That is the only way it could be shown, aside from his own testimony. And we think that all his declarations from the time of setting out on his expedition, in connection with his acts, are competent to show with what intent he went there. And if an innocent intent may be shown in this way, then the contrary may also be shown in the same manner. And in this view the evidence was in no sense collateral. If Green then denied making such a declaration, it might be shown that he in fact did both, as tending to impeach the witness by contradicting him; and as going to establish the fact that he went there for the purpose of beginning an affray, and as tending to justify, perhaps, more vigorous defense of any supposed offensive movement on the part of Green."

The true distinction, we apprehend, as to the admissibility of evidence of threats, and one apparently overlooked in many of the cases, is this: when sought to be introduced by the defendant as a justification for the homicide, and without any overt act, he must show that they have been communicated; otherwise they can furnish no excuse for his conduct; but when offered to prove a substantive fact, namely, the state of feeling entertained by deceased toward the accused, it is competent

testimony whether a knowledge of the threats be brought home to the defendant or not.

I will merely add that the remoteness or nearness of time, as to threats and declarations pointing to the act subsequently committed, makes no difference as to the competency of the testimony: *State v. Ford*, 3 Stroh. L. 517, note. Upon the authority of the note, then, as laid down by Mr. Starkie and others, and as illustrated by numerous adjudicated cases, we are clear that the testimony of Cosby should have been admitted, as it conduced to prove, in connection with other evidence, the *quo animo* with which Reese resorted to the brothel on Mcintosh street that night; and that his manner and conduct corresponded with that purpose, so as to warrant Keener in believing that the same scenes were to be repeated there that night which had been re-enacted several times before; and that no alternative would be left but to retreat again, as he had done before twice or three times, or take the consequences. In view, then, of the frequent failure of justice from the failure of evidence, and thoroughly convinced, as we are, that no competent means of ascertaining the truth ought to be neglected, we think the testimony of James Cosby was improperly ruled out. It was pertinent to the issue, and ought to have been submitted to the jury. It showed the intent with which Reese resorted to this brothel; and also his feeling toward the defendant.

We propose to consider and dispose of the sixth, seventh, eighth, and ninth assignments of error together. They present for our review the main questions in this case; all the rest are comparatively of minor importance. In his charge to the jury, the court, in the language of the bill of exceptions, "failed, omitted, and declined, although requested by the counsel for the prisoner so to do, to read to the jury or comment upon the twelfth and thirteenth sections of the fourth division of the penal code, upon which counsel for prisoner had mainly relied for his defense. The court, having read the first, second, third, fourth, sixth, and seventh sections, then charged the jury that the section of the penal code applicable to the grounds on which the defense had been placed was as follows [reading the fifteenth section, to which failure, omission, and refusal to charge, and charge as given, counsel for prisoner excepted]. The court was also requested by counsel for prisoner to charge the jury as follows: 1. That if they believed from the evidence that the prisoner, at the time of the commission of the act, was under the fears of a reasonable man that the deceased was

manifestly intending to commit a personal injury upon him, amounting to felony, the killing was justifiable homicide; 2. That if they believed from the evidence that the prisoner was under similar fears of some act of violence and injury less than a felony, his offense was manslaughter, and not murder. Whick charge, so requested, the court failed and refused to give; to which failure and refusal counsel for the prisoner excepted." It is also assigned as error that the court failed and omitted to read to the jury and comment upon the ninth, tenth, and eleventh, as well as the twelfth and thirteenth, sections of the fourth division of the penal code, although requested by counsel so to do.

I would remark that by reference to the bill of exceptions I do not find that any request was made of the court to give in charge and expound to the jury the ninth, tenth, and eleventh sections of the fourth division of the code. These three sections relate exclusively to involuntary manslaughter; and there is not a particle of proof to make this killing that offense. It was murder, voluntary manslaughter, or justifiable homicide. The court was right, therefore, in pretermmitting that portion of the code which defines, with its subdivision, involuntary manslaughter, and annexes a penalty to each grade of the offense. Counsel for prisoner do not pretend that this law is applicable to his case. To give it in charge to the jury, then, would be to distract and burden their minds unnecessarily and improperly. Whether or not there was error in the remainder of these assignments, depends upon the fact of whether there was any evidence upon which the jury might have mitigated the offense from murder to a lower grade of homicide. We go one step further: if the circumstances of the killing were such as to leave any doubt whether Keener had not been actuated by the principle of self-preservation rather than that of malice, we shall be constrained to remand this cause for a new trial. For the question whether Keener killed Reese to prevent Reese from killing or doing him some great bodily harm has not, in the opinion of this court, been fully submitted to the jury. A part of the law only, applicable to the defense, was given; and where a man's life is at stake, it is fit and proper to allow him the benefit of every provision of the code.

In every charge of crime there must be a question of law and a question of fact. Is there any such rule of law as that on which the indictment is founded? Has the defendant violated that rule? The decision of both of these is necessarily

involved in the general verdict of "guilty" or "not guilty"—the only form of verdict allowed by our code. The former finding affirms both the existence of the law and its violation by the accused; the latter, either that there is no such law, or that it has not been transgressed. It is the duty of the judge to declare to the jury what the law is, with its exceptions and qualifications; and then to state hypothetically that if certain facts which constitute the offense are proved to their satisfaction, they will find the defendant guilty; otherwise, they will acquit him. In this state—in all free governments—in tenderness to the accused, great latitude has been allowed to counsel in stating and enforcing their views of the law in criminal cases. And a liberal confidence has been reposed in those who are called to defend the liberty and life of the citizen in the hour of trial. And where counsel in their place, under their professional obligations to the court and the country, insist that certain portions of the law apply to the facts of their client's case, especially where it is capital, it would be better to read the law to the jury, with such comments and explanations as the court, possessing the superintending power, might feel it to be its duty to give.

The theory of our system is, that the jury have not only the power but the right to pass upon the law as well as the facts in rendering their verdict; and yet this anomaly stares us in the face, that they are not permitted even to take the code to their consultation-room. They know nothing of the law, except so much and such parts of it as are given them in charge by the court. This fact alone is strongly suggestive of the propriety of withholding no law from them which they are entitled to consider. Suppose, as in the present case, it were doubtful whether this offense, as proved by the witnesses, came under the twelfth and thirteenth sections of the fourth division of the penal code, as contended for by the defendant's counsel, or under the fifteenth section, according to the opinion of the presiding judge, should not both have been submitted? In Case's English Liberties, or the Freeborn Subject's Inheritance, 201, 202, it is said: "The office and power of juries in criminal cases is judicial; from their verdict there lies no appeal; by finding 'guilty' or 'not guilty,' they do complicitely resolve both law and fact." And that in a criminal trial the jury may determine the law and the fact of the case, has been supported by every English judge except Chief Justice Jeffries, in the case of *Colonel Sidney*, 8 Harg. St. Trials, 805. And to their credit be it spoken, that the juries have always been right on fundamental questions of

liberty and popular right: *Maul's Case*, 1 Chand. Crim. Trials, 143, 149, 153, 269, 288; *Zenger's Case*, Id. 153; *Bayard's Case*, Id. 269; *Yenger's Case*, 17 How. St. Trials, 675, 724. But how can they judge of law which is not before them? There is no alternative—either the courts must refer to the jury the whole law of the case, or the supposed distinction between the power of juries in civil and criminal cases should be abolished.

With these preliminary remarks, we proceed to examine the twelfth, thirteenth, and fifteenth sections of the fourth division of the penal code. By section 12 it is enacted that "there being no rational distinction between excusable and justifiable homicide, it shall no longer exist. Justifiable homicide is the killing of a human being by commandment of the law, in execution of public justice; by permission of the law, in advancement of public justice; in self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; or against any persons who manifestly intend and endeavor, in a riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein;" Cobb's Dig. 784. Section 13 declares that "a bare fear of any of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing; it must appear that the circumstances were sufficient to excite the fears of a reasonable man; and that the party killing really acted under the influence of those fears, and not in the spirit of revenge;" Id. Section 15 provides that "if a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that in order to save his own life the killing of the other is absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given;" Id. 785.

It is clear that there is no conflict between these different sections. The last two sections may be construed, perhaps, to be qualifications of the first. The right of self-defense is given by the twelfth section against one who manifestly intends to commit a felony, by violence or surprise, on the person or property of another. Section 13 limits this right by requiring that the circumstances to justify the killing must be sufficient to excite the fears of a reasonable man; and that the party killing really acted under the influence of these fears, and not in

the spirit of revenge; and the fifteenth section still further restricts the right, by providing that the danger should be so urgent and pressing, at the time of the killing, that in order to save his own life the killing of the other was absolutely necessary. Either this is the true exposition of the three sections taken together, and they should not therefore be separated, or else the fifteenth section applies to a different class of cases than the one contemplated in the twelfth; and we are not prepared to say that the latter would not be the sounder interpretation.

Was there any evidence, then, which entitled the defendant to have the twelfth and thirteenth sections given in charge by the court to the jury? It is in proof that Reese went to the house of Yarborough the night on which he was killed, with his bosom boiling with hate toward Keener, and breathing forth threats of revenge should he encounter him. He finds him in the bedroom of the miserable mistress of the brothel; he kicked furiously at the door; he jobbed at the window with his knife, the blade of which was six inches long; he called out to Jane Yarborough: "Show up your Keener, I want to cut his damned throat." Keener dresses and comes out upon the piazza, armed with a cane and pistol; Reese walked out on the piazza and asked for a pistol. He then seated himself on the bench, with folded arms. Reese called Keener "a damned, cowardly, pusillanimous son of a bitch." Keener asked him to repeat it; he did so; daring Keener to point his pistol at him, making at the same time a motion with his arm. Keener fired, and Reese fell; he was shot in the abdomen, and from the direction of the balls Reese must have been in a rising attitude, or sitting and bending over, when the wound was received. We ask not whether this proof is sufficient to justify Keener in killing Reese, or even to reduce the homicide to manslaughter. That is not the question. Is there no evidence which tends to show that Reese intended, by surprise or violence, to commit a felony upon the person of Keener? Or, at any rate, that the circumstances were sufficient to excite the fears of a reasonable man that such was the intention of Reese? Without expressing or intimating the slightest opinion as to the sufficiency of the testimony, we are unanimously of the opinion that the facts which have been detailed, in connection with others in the record, were such as to have entitled the accused to the consideration by the jury of the law upon which he rested his defense, and consequently that it was error in the court to refuse to give this law in charge to the jury when requested to do so by prisoner's counsel.

The presiding judge instructed the jury, very properly, to inquire whether the homicide was murder, voluntary manslaughter, or done in self-defense; and read to the jury the law defining each; and assigned as a reason the facts disclosed by Emma Burns and Dr. Felden. Why was not all the law respecting voluntary manslaughter and justifiable homicide given in charge? How could it be said that there was evidence to authorize the reading of the fifteenth section, but none which was applicable to the twelfth and thirteenth sections; and that too when it is admitted that stronger proof is necessary to acquit under the fifteenth than under the twelfth and thirteenth sections? If the evidence referred to by the court tended to establish the defense of the prisoner under the fifteenth section—and if it did not, why was it read?—why did it not likewise tend to the same purpose under the twelfth and thirteenth sections? The jury who were sworn to try this traverse had a right to find their verdict upon their own convictions and consciences; for, as was very pertinently said by Chief Justice Vaughn, in *Bushell's Case*, Vaugh. 148, "a man cannot see by another's eye, nor hear by another's ear. No more can a man conclude or infer the thing to be resolved by another's understanding or reasoning." He continues: "Upon all general issues, as upon not culpable pleaded, the jury find upon the issue to be tried, wherein they resolve both law and fact complicate, and not the fact itself; so as though they answer not simply to the question, What is the law? Yet they determine the law in all matters where issue is joined and tried:" Id. 150.

Said Chief Justice Parsons, in *Coffin v. Coffin*, 4 Mass. 25 [3 Am. Dec. 189]: "The issue involves both law and fact, and the jury must decide the law and fact. To enable them to settle the fact, they must weigh the testimony; that they may truly decide the law, they are entitled to the assistance of the judge." How to the "assistance"? By withholding from them the law upon which the prisoner professedly grounds his defense? No: nor by having it read, and then taking the law implicitly and without questioning from the court; otherwise the verdict is not theirs but in part only. And general verdicts should be abrogated and special verdicts revived. They should find the naked fact instead of the criminal fact. It follows demonstrably, then, under our code, that to make a whole verdict, a legal verdict, the jury must find the conclusion of law upon the facts; and notwithstanding it is their privilege, as well as their duty, to receive "assistance" from the court, still the conclusion of law

upon the facts must be the result of their own conviction and understanding. If the power thus committed to the jury be exercised against the opinion of the court to convict, the remedy is with the court to set aside the verdict and award a new trial. If used to acquit, it must be an extreme case; and although contrary to law, is rarely tainted with corruption. It is produced generally by a liberal interpretation of the law in favor of liberty and life.

In connection with the topics already discussed, the court was requested, by counsel for the prisoner, to charge the jury: 1. That if they believed from the evidence that prisoner, at the time of the commission of the act, was under the fears of a reasonable man that the deceased was manifestly intending to commit a personal injury upon him amounting to felony, the killing was justifiable homicide. This charge the court refused to give. And wherefore? Is it not in exact accordance with the terms of the code? 2. That if they believed from the evidence that prisoner was under similar fears of some act of violence and injury less than a felony, his offense was manslaughter. This request was likewise refused; and although not in the code in so many words, it would seem to be a necessary corollary from the sections we have been considering. Indeed, it is a familiar principle, and one scattered everywhere in works on criminal pleading. "Neither can a man," says Hawkins, "justify the killing another in defense of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another, who, claiming a title to his house, attempts to enter it by force or shoots at it, or that breaks open his windows in order to arrest him, or persists in breaking his hedges after he is forbidden, is guilty of manslaughter:" 1 Hawk. P. C. 372. The requests being legal, and refused, the judgment complained of upon these points must be reversed.

The seventh ground taken in the motion for a new trial was because James Sikes, one of the jurors sworn in chief, did not stand indifferent between the state and the prisoner, said juror having, previously to being sworn, expressed decided opinions in relation to the guilt of the accused, and such strong prejudice against the accused as rendered him an incompetent juror in law, and which were unknown to the accused or his counsel until after the verdict was rendered, said Sikes having previously answered negatively the usual questions on the *voir dire*. As this question cannot recur on the rehearing of this cause, and no principle is involved in its adjudication, we for-

bear to consider it; our decision upon the whole case being that the judgment of the superior court ought to be set aside, and a new trial granted, which is ordered accordingly.

OBJECTION TO JURY MUST BE TAKEN BEFORE THEY ARE IMPANNELED: *Commonwealth v. Knapp*, 20 Am. Dec. 534; if party was aware of disqualification before impanelment: *Parmele v. Gathery*, 1 Id. 65; juror once sworn cannot be challenged for any pre existing cause: *Gillespie v. State*, 29 Id. 137.

CONSTRUCTION OF STATUTE—WORDS TAKEN IN ORDINARY SENSE: *Quigley v. Gorham*, *ante*, p. 139.

OPINION OF WITNESS as to whether defendant might expect or look for danger from acts of the deceased: See note to *Stewart v. State*, 53 Am. Dec. 430, where authorities are collected.

GENERAL CHARACTER.—Evidence that deceased was a "turbulent and quarrelsome man," on trial for murder, inadmissible: *Pritchett v. State*, 58 Am. Dec. 250. Evidence that deceased was quarrelsome and dangerous while under the influence of drink inadmissible, though it appears he had been drinking on the day of the killing, where there is no evidence of provocation or excuse: *State v. Field*, 31 Id. 52; *State v. Chandler*, 52 Id. 599.

PRIOR THREATS AND DESPERATE CHARACTER OF DECEASED, IN CASE OF MURDER, are competent evidence where there are circumstances tending to show self-defense: *Pritchett v. State*, 58 Am. Dec. 250, and note.

THREATS OF DECEASED PRIOR TO TIME OF KILLING NOT ADMISSIBLE unless communicated: *Carroll v. State*, 58 Am. Dec. 282.

UPON SUBJECT OF THREATS OF DECEASED, see extensive note to *Campbell v. People*, 61 Am. Dec. 53, where a valuable collection of cases will be found.

JURY ARE JUDGES OF BOTH LAW AND FACT IN CRIMINAL CAUSE: *State v. Croteau*, 54 Am. Dec. 90; *Patterson v. State*, 44 Id. 530; *Lord v. State*, 41 Id. 729.

THE PRINCIPAL CASE IS CITED to the point that jury in criminal cause are judges of both law and fact: *Mitchell v. State*, 22 Ga. 234; *Golden v. State*, 25 Id. 531; *McDaniel alias Hickey v. State of Georgia*, 30 Id. 856. Also to the point that "it is the duty of the judge to declare to the jury what the law is, with its exceptions and qualifications": *McCullum v. State*, 34 Id. 407; *Brown v. State*, 40 Id. 696; also to the point that the court should give in charge to the jury the different grades of homicide, if there was any evidence tending to show a different grade from the one charged: *Farris v. State*, 35 Id. 242; also cited, but not approved, to the point that threats of the deceased in a case of homicide, uncommunicated, are admissible to show the state of feeling entertained by the deceased against the defendant: *Hoyle v. State*, 39 Id. 772; cited to the same point in *Peterson v. State*, 50 Id. 143; cited in *Pound v. State*, 43 Id. 129, to the point that "if there was any doubt as to whether the prisoner was actuated by the principles of self-preservation or malice, any testimony calculated to illustrate the motive to the jury would be proper." Upon the different degrees of murder, the court referred to the opinion of the principal case, stating that it did not apply to trespass affecting goods, but to trespass affecting the person only, in *Hayes v. State*, 58 Id. 47.

FRITH v. FRITH.

[18 GEORGIA, 278.]

TEMPORARY ALIMONY.—A husband, in an action for divorce, will not be allowed to prove that the wife practiced a fraud upon him in the marriage, to avoid supplying her with temporary alimony and a sufficient sum to pay her attorney's fees.

LIBEL for divorce by Thomas D. Frith against Francis Frith, on the ground that the wife was pregnant at the time of the marriage, and fraudulently kept the fact from him. The error complained of on appeal is that the court would not allow the husband to prove the facts alleged, as a fraud practiced upon him, to avoid the allowance of temporary alimony to the wife.

H. Holt, for the plaintiff in error.

Douglas, for the defendant in error.

By Court, BENNING, J. Was the husband, under the particular facts of this case, bound to supply to the wife temporary alimony, and also a sum sufficient to pay her attorneys their fees? This is the sole question. It was insisted for the husband that as the wife in the marriage had practiced a fraud upon him, which fraud he was able to prove by her own confessions as well as by other evidence, he was not. But we do not see that this distinguishes his case from the cases in which the husband has been held to be so bound. This, if true, amounts only to the making out of a case on the part of the husband which will give him a title to a divorce. And if, when the husband says he is able to make out such a case as that, he is to be relieved from alimony and the expenses of the wife's side of the suit, then the number of cases in which he will not relieve himself from such alimony and expenses will probably be small.

In *McGee v. McGee*, 10 Ga. 478, a case in which the husband was the defendant in the libel, the husband answered, on oath, denying the ground of the libel, and offering, as he said he had repeatedly done before, to receive the wife again into his house; yet he was made to pay alimony. To the same effect are *Methvin v. Methvin*, 15 Id. 98 [60 Am. Dec. 664], and *Roseberry v. Roseberry*, 17 Id. 189. The rule is thus stated by Shelford: "After proof of a marriage in fact, alimony pending the suit will be allotted, whether it be commenced by or against the husband, not only in cases of impotency, but in all cases of nullity of marriage, and in suits for restitution of conjugal

rights, or for divorce by reason of adultery or cruelty." And this statement of the rule seems to be well supported by decided cases. I refer particularly to *Portsmouth v. Portsmouth*, 3 Add. 63, and *Bird v. Bird*, 1 Lee, 209. According to this last case, this court, in *Roseberry v. Roseberry, supra*, went too far in permitting the husband to object to the payment of the alimony; that the marriage, though a marriage *de facto*, was not one *de jure*.

We think, therefore, that the court below was right in refusing to receive the husband's offered proof.

COURT WILL NOT STRICTLY SCRUTINIZE CONDUCT OF WIFE IN DETERMINING HER RIGHT to temporary alimony, but it is allowed almost as a matter of course upon proof of marriage and pendency of suit for divorce: *Methvin v. Methvin*, 60 Am. Dec. 684, and note which treats of the whole subject of alimony at length; and on page 676, under "Adultery and Misconduct of Wife," elaborately discusses the point adjudicated in the principal case, and cites valuable authorities, among which is the principal case.

KNOWLES v. LAWTON.

[18 GEORGIA, 476.]

WHETHER MERGER OF EQUITY OF REDEMPTION into the legal estate occurs when they meet in one person depends upon the intention of that person, and the estates are not merged if he does not so intend.

DOCTRINE OF MERGER—WHEN ASSIGNMENT OF MORTGAGE OR FORECLOSURE IS TAKEN by the holder of the equity of redemption, and he goes on and prosecutes the foreclosure suit to judgment and sells the premises, it is presumed from such act that he does not intend to have the equity of redemption merge in the legal estate, and therefore such merger will not take place.

PURCHASER OF MORTGAGED PREMISES IS BOUND BY JUDGMENT of foreclosure rendered against the mortgagor, although he, the purchaser, is not made a party to the suit.

PURCHASERS OF DIFFERENT PARTS OF PREMISES COVERED BY MORTGAGE cannot compel the holder of the mortgage to exhaust the portion left in the hands of the mortgagor first; nor the portions sold, in the inverse order of the sales; but the holder of the mortgage may proceed against any portion he chooses.

BILL in equity by Joseph E. Knowles and others against Wilborn J. Lawton and others to set aside a judgment of foreclosure of a mortgage, and declare sales made under the judgment void; praying that the real value of the land sold be applied toward the satisfaction of the mortgage instead of the amount realized at the sale, and if not sufficient amount be thus

obtained to satisfy the mortgage, then that other tracts of the land covered by the mortgage be sold in the inverse order of the dates upon which they had been disposed of by the mortgagor until amount sufficient be realized to satisfy the mortgage. The facts alleged in the bill necessary to the points decided are as follows: That one John L. Casey executed a note and mortgage for three thousand three hundred and thirty-five dollars and seventy-five cents to James Thomas, on December 6, 1848, which mortgage was upon nineteen different lots of land described by number and district. The mortgage was recorded on December 13, 1848. Casey sold one of the lots to Nichols Boon, November 12, 1849, and Boon sold to plaintiffs. Several other of the lots were sold to different parties, one of which came into the hands of the defendant Lawton on April 1, 1852, and on the same day Lawton purchased from Casey all of the lots then unsold. Lawton subsequently purchased the note and took an assignment of the mortgage, and by that means, the bill alleges, the equity of redemption of the lots previously bought by Lawton merged in the legal estate, and the mortgage was thus extinguished. That Cheever, one of the defendants, was let into the trade by Lawton, and he and Lawton foreclosed the mortgage and entered into and carried out an agreement to defraud complainants by having that portion of the mortgaged premises sold first which Lawton himself purchased from Casey, and by fraudulent means prevent it from bringing its full value, purchase it themselves, and then fall upon and sell the lots of complainants to satisfy the amount remaining due on the mortgage; and that in pursuance of their scheme Lawton and Cheever induced the by-standers at the sale not to bid on the lots, and contrived to purchase them themselves for a very small sum compared to their real value; and the bill further alleged that if the sale had been properly conducted, the lots would have brought enough to have satisfied the mortgage. An injunction was granted restraining the sale of the lots of complainants. The answer admitted the purchase of the different lots by Lawton, and also the assignment of the mortgage to Lawton by Thomas, but denied that Cheever had any interest in the mortgage, or was interested other than as a joint purchaser with Lawton at the sales; denies all the allegations of fraud, and alleges that Lawton became a purchaser at the sale to save himself, and that due notice of the sale was given, and the complainants and their attorneys were there at the sale, and could have purchased the property themselves or bid upon the same and compelled de-

fendants to pay more for it if they had so desired. Upon the filing of the answer the injunction was dissolved, and the complainants appealed.

R. F. Lyon and Slaughter, for the plaintiffs in error.

H. M. Buford and Miller and Hall, for the defendants in error.

By Court, BENNING, J. The first question in this case is whether the equity of redemption in any of the lots of land became merged in the legal estate. It is alleged in the bill that with respect to a number of the lots these two estates met in Lawton and Cheever; and this allegation, it is insisted by the counsel for the plaintiffs, has not been fully denied by the answer. And they argue that when the equity of redemption and the legal estate meet in the same person or persons, the law makes the former estate merge in the latter. Whether this allegation has been denied by the answer or not we do not find it necessary to inquire. Let us admit that it has not been. Considering, then, the fact to be that the two estates did, in some of the lots, meet in Lawton and Cheever, the question is, Did the equity of redemption become, in such lots, merged in the legal estate?

Whether a merger shall take place or not, depends, as a general rule, upon this: whether the person in whom the two estates meet intends that it shall take place. In *Forbes v. Moffatt*, 18 Ves. 390, the master of the rolls says: "It is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, in reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot. The first question, therefore, is, whether John Moffatt has done anything to determine that election—which he undoubtedly had; if not, the question will be upon the presumption of law under the circumstances of the case." This statement of the matter of the rolls is supported by several cases which he cites, and also by some cases which have been decided since the decision in the case in which the statement was made, as these: *Wigzell v. Wigzell*, 2 Sim. & St. 364; *Lord Clarendon v. Barham*,

1 You. & Coll. C. C. 688; as stated in Ch. Eq. Dig. 788, 14; *Reddington v. Reddington*, 1 Ball & B. 181, as stated in same; *Pitt v. Pitt*, 1 Turn. & R. 184. And with this statement accords a decision of this court, the decision in *Jackson v. Tift*, 15 Ga. 557. In that case Jackson, the mortgagee, became the purchaser of the equity of redemption in the two halves of the mortgaged lot of land. The facts were such as to require the presumption that he intended the equity of redemption in one of the halves to merge, but the equity of redemption in the other not to merge. The decision was that as to the first-mentioned half there was a merger; as to the other half, none.

We think it therefore safe to say that, as a general rule, merger does not take place, if the person in whom the two estates meet intends that it shall not take place. That being so, the question becomes this: Did Lawton and Cheever intend, in this case, that their equity of redemption should merge in their legal estate?

And the answer to that question must be, No; for they took from the mortgagee, Thomas, not a conveyance to the land, but an assignment of the mortgage; they stepped into the place of Thomas in the foreclosure suit; they prosecuted that suit to judgment and execution; they tried to sell under the mortgage *si. fa.* all of the mortgaged lands; and they did sell a part of those lands, the very part in respect to which the bill insists that there was a merger, viz., that part in which they themselves had the equity of redemption. Now, the whole of this course of conduct on their part was inconsistent with an intention that there should be a merger. It follows that there was no such intention. And if there was no such intention, there was no merger; for, as we have seen, there is no merger where the intention is that there shall be none.

Was the judgment of foreclosure binding on the plaintiffs, as they were not parties to it? The only party defendant to the judgment was Casey, the mortgagor. But the plaintiffs were the purchasers from Casey of parts of the property contained in the mortgage; and they assert no right, except such as they derived from him by that purchase. And they could by that purchase derive from him no right as against the mortgage which he, Casey, did not himself possess. And he did not himself possess the right to put the mortgaged property in a situation which would render it necessary for the mortgagee in framing his suit of foreclosure, under the judiciary act of 1799, to make as a party defendant to the suit any other person than

the mortgagor himself. That act says: "The method of foreclosing mortgages on real estate in this state shall be as follows: Any person applying and entitled to foreclose such mortgage, etc., shall petition the superior court, etc., stating the case, and the amount of his, her, or their demand, and describing such mortgaged property; and the court shall grant a rule, that the principal, interest, and cost shall be paid into court, etc., which rule shall be published, etc., or served on the mortgagor, or his special agent," etc. It is only the "mortgagor or his special agent" that the rule is to be served on. The mortgagor, therefore, has no right so to treat the mortgaged property as to make it necessary for the mortgagee, in order to get a foreclosure, to serve his rule upon any person except him, the mortgagor. But this right the mortgagor would have if he could, by selling the mortgaged property, give to the vendee the right to be a party to a rule for foreclosure. The right to be a party to that rule the mortgagor, therefore, cannot give to his vendee.

It follows that the vendee is bound by the judgment of foreclosure, although not a party to it. He is, however, in privity with the vendor, who is a party to it. And this is no more than what is true in analogous cases. A general judgment binds the property of the defendant to it in whosesoever hands the property may be found, if it got into those hands at any time after the lien of the judgment had fastened itself upon it, notwithstanding that the person into whose hands it may have so got had never, in fact, heard of the judgment.

When the mortgagor sells part of the mortgaged property at different times to different persons, can these persons compel the mortgagee to go for his money, first to the property remaining unsold in the hands of the mortgagor, and if that should prove insufficient, then to the parts of the sold property, in any particular order of precedence? The mortgagee, by the terms of his mortgage, has the legal title equally to every part of the mortgaged property; i. e., he has, if the mortgagor himself had that title to mortgage; and this legal title the mortgagee cannot be deprived of by anything except some act of his own. Therefore he cannot be deprived of it by any act of the mortgagor's; as a sale of the property by the mortgagor. And hence, if there be a failure to pay the mortgage debt, and therefore a forfeiture of the mortgage, every part equally of the mortgaged property, even though some of it may have been sold by the mortgagor, becomes at law, to him and his vendee of such part,

dead. And being thus dead to them at law, on what terms is it to be made alive in equity? Only on the terms of the payment of the mortgage debt. Further than this, equity itself will not interfere with the legal rights of the mortgagee: See 2 Bla. Com. 158; Code on Mortgage, 513, 517. This is the doctrine of the old law; and what change in the old law has been made by the new, by our statute? In respect to the right of redemption, none. Before the mortgagor can by the new law redeem his land, he has to pay the mortgage debt; and that was the very thing which he had to do by the old law before he could redeem his land. The change made by the new law is merely as follows: By the old law, the effect of foreclosure was to vest the mortgaged property absolutely in the mortgagee; by the new, the effect of foreclosure is to vest in the mortgagee the right to sell that property, and to take as much of the proceeds of its sale as shall be sufficient to pay him his debt and costs. This change does not at all enlarge the terms on which the mortgagor may redeem. Notwithstanding this change, he must still, before he can redeem, pay the debt. Previous payment of this the new law requires explicitly and peremptorily. Its language is: "And the court shall grant a rule that the principal, interest, and cost shall be paid into court within twelve months thereafter [now by the next term]; and unless the principal, interest, and costs be so paid, the court shall give judgment for the amount which may be due on such mortgage, and order the property mortgaged to be sold in such manner as is prescribed in cases of execution, and the money shall be paid to the mortgagee or his attorney; but where there shall be any surplus, the same shall be paid over to the mortgagor or his agent." Unless the principal, interest, and costs be so paid, the court shall give judgment for the amount due on the mortgage, and order the mortgaged property to be sold in such manner as is prescribed in cases of execution.

The statute then gives to the mortgagee the right to sell, under his judgment of foreclosure, any part of the mortgaged property, at his own election. A court cannot interfere with a right thus given; certainly not further than to compel the mortgagee to take his money, if it should be tendered to him, and then to desist from any proceeding to sell the property.

This being so, a court of equity could not, at the instance of purchasers from the mortgagor of the mortgaged property, compel the mortgagee to resort first to the property remaining in the hands of the mortgagor, and then, according to some order of priority, to that in the hands of those purchasers. And this,

in part, is what a court of equity is in this case asked to do. The equity of redemption not having become merged in the legal estate, the defendants Lawton and Cheever, as transferees of the mortgage, stand in the shoes of Thomas, the mortgagee. They therefore are to be considered as mortgagees. Considered as mortgagees, they are entitled to have payment of their debt before they can be required to abstain from selling at their own election any of the lands mortgaged to them. On the other hand, the plaintiffs are the purchasers of parts of the mortgaged lands from Casey, the mortgagor. They therefore stand in the shoes of Casey, and so are to be considered as mortgagors. Considered as mortgagors, the only right which they have as against the mortgagees is the right to redeem their land on payment of the mortgage debt. Such a right as that does not give them a title to ask a court of equity to compel Lawton and Cheever, considered as mortgagees, to bring the parts of the mortgaged property to sale in any particular order. After Lawton and Cheever shall have been paid the amount due on the mortgage, then those who pay that amount may raise the question who, if any, are to contribute to their reimbursement, and in what order and proportion they are so to contribute. On this question nothing is now intended to be said.

I will, however, suggest for inquiry on this question whether, when, *e. g.*, a mortgagor sells a part of the mortgaged property, the remaining part is the part which, as between vendor and vendee, is to be first applied to the payment of the mortgage, does not depend on the intention of vendor and vendee. Suppose A., having property worth ten thousand dollars, with a mortgage on it for five thousand dollars, sells half of it to B. for two thousand five hundred dollars, the intention of both A. and B. being that the other two thousand five hundred dollars, which this half is worth, shall be paid by B., the purchaser, to the mortgagee, in satisfaction of half of the mortgage. In such a case, if B. should pay that two thousand five hundred dollars to the mortgagee, ought B. to be allowed to call on A. to pay an equal amount to him? And in such a case, would not the fact that the half of the land sold was sold for but half its unencumbered value, *i. e.*, was sold for all its value, less its share of the incumbrance on it, be evidence of an intention in both vendor and vendee that that half of the land was to pay its half of the mortgage? I think in practice it is true, in general, that when a mortgagor sells a part of the mortgaged property, he requires and obtains for it a full price—a price equal to what would be the

value of the part if it were free from incumbrance. And if in such a case the vendee, on losing his part by the operation of the mortgage, is entitled to contribution from the vendor, is it not because there was an intention, in both vendor and vendee, that the vendee should have contribution, an intention of which the payment of this full price is the evidence?

The bill states that Lawton entered into a fraudulent contract with Clifton, the holder of one of the lots included in the mortgage, to prevent him from "running the land;" a contract by which Lawton agreed to protect Clifton's title to that lot against the mortgage, or to compensate him for the loss of the lot in case it should be sold by the mortgage; and that Clifton, who had commenced to bid for lot No. 281, in consequence of this agreement, desisted from bidding, and let the lot be knocked off to Lawton at three hundred dollars, when it was worth two thousand five hundred dollars, and when he would himself have given two thousand dollars for it but for the agreement; and that by the agreement Clifton was also made to abstain from bidding for another lot.

Now it seems that the sale at which this agreement (as it is stated in the bill to have been) took place was a regular public sale, after due advertisement, under the judgment of foreclosure; a judgment to which the complainants, if not parties, were privies. It is to be presumed, therefore, that they were present at the sale, and might, if they had seen fit, have made every piece of land fetch its full value. And it does not appear but that at the time of sale they knew or suspected what was going on, as they say, between Lawton and Clifton.

Suppose, therefore, the allegations in the bill be taken to be true, to what relief do they entitle the complainants? The most that a court of equity in such a case would do would be to annul the purchase of the two lots by Lawton or Lawton and Cheever, and order another sale of them—a sale just like that was at which the annulled purchase had been made. A court of equity could not make Clifton compete for the lots, or, indeed, make Lawton and Clifton cease from acting on their old agreement; so that at the new sale, if one were ordered, the complainants would not in a single respect be any better off than they were at the old.

The equity, then, that is in this statement of the bill is not very strong; but if it were stronger, it could not be of any avail to the complainants, for the answer denies the truth of the statement.

For aught that appears, then, taking both bill and answer together, the lands which were sold by the sheriff under the judgment of foreclosure were fairly sold. If so, the prices they sold for are the sums to be credited on the mortgage debt.

And this disposes of all the questions in the case that ought to be disposed of, considering what is the present state of the case.

The result of all that has been said is, that the dissolution of the injunction by the court below was right.

MERGER—DOCTRINE OF MERGER OF ESTATES IS NOT FAVORED IN EQUITY; and where two or more rights or estates are united in one person, equity will keep them distinct, if from the intention of the party, express or implied, he wishes them so kept: *James v. Morey*, 14 Am. Dec. 475, and note on page 512; *Millsbaugh v. McBride*, 34 Id. 360, and note; and *Duscan v. Drury*, 49 Id. 565, and note, in which earlier cases in these reports upon the point are collected.

RIGHTS OF PURCHASERS OF MORTGAGED PREMISES TO HAVE MORTGAGE charged upon different portions in the inverse order of the dates of sales: See *Chittendon v. Barney*, 18 Am. Dec. 672; *Guion v. Knapp*, 29 Id. 741, and note 747, where authorities are collected; *Patty v. Pease*, 35 Id. 633; and *Engle v. Haines*, 43 Id. 624.

THE PRINCIPAL CASE IS CITED to the point that purchaser of mortgaged premises is bound by judgment against the mortgagor: *Williams & Co. v. Terrell*, 54 Ga. 463; *Guerin v. Danforth*, 45 Id. 496; *Barden v. Brady*, 37 Id. 665; see also *Johnston v. Crawley*, 25 Id. 330. To the point that purchasers of different parts of mortgaged premises cannot compel holder of mortgage to exhaust portions sold in inverse order of sales: *Barden v. Brady*, 37 Id. 665. In the case of *Solomon v. Sparks and Breazeal*, 27 Id. 389, the court say, *per* Benning, J.: "There are some decisions of the court inconsistent with the idea that a mortgage deed is not a conveyance," and cite the principal case, among others; also in *Semmes v. Moses*, the principal case is referred to, and the court, *per* Lumpkin, J., say: "We do not design to disturb the doctrine in Lawton and other, 18 Ga. reports," as it does not "conflict with this." In *Harris v. Glenn*, 56 Id. 97, the court say: "In the case of mortgage on land, it may be questioned whether the right [to exemption from sale] should not be asserted before judgment passed for foreclosure. The judgment goes against the specific property, and is a mandate to the sheriff to sell it;" and cite the principal case.

SMITH v. CITY COUNCIL OF ROME.

[19 GEORGIA, 89.]

GIFT OF RIGHT OF WAY FOR STREET confers the right to level the same and to do everything requisite to the making of the street, but does not amount to a gift of the earth or other materials that may exist within the boundary lines of the right of way given.

TAKING ROCK FROM BLUFF WITHIN BOUNDARIES OF RIGHT OF WAY granted over another's land for use in macadamizing streets and building culverts

amounts to a commission of waste, which will be enjoined at the suit of the proprietor of the land.

INJUNCTIONS TO STAY WASTE ARE GRANTED almost as a matter of course.

BILL for injunction to stay waste. The opinion states the case.

Wright, for the plaintiff in error.

T. W. Alexander for the defendant in error.

By Court, BENNING, J. In this case we assume that the answer is true. The answer says, in substance, that the complainant gave to the defendant the right to open two public streets through his land; that the defendant, in the exercise of this right, opened the two streets; that a "high rocky bluff" projects itself a part of the way across the track of one of the streets; that the defendant took from this bluff, at a point within the boundaries of the street, some rock, and used the rock in macadamizing the streets of Rome, and in building culverts; and that the defendant claims the right thus to take and use such of the rock as is within the boundaries of the street.

The first question therefore is, whether the defendant has this right. The gift by the complainant to the defendant was that of the right of way over his land. It was no more than that. Is a gift of the right of way a gift of the earth, rock, trees, and other materials which may happen to exist within the boundaries of the way? Is a gift of the right of way a gift of all the gold that may exist beneath the surface of the way, the right to which is given?

In *Goodtitle ex dem. Chester v. Acker*, 1 Burr. 143, Lord Mansfield said: "1 Roll. Abr. 392, B, pl. 1, 2, is express 'that the king has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil.' So do all the trees upon it, and mines under it (which may be extremely valuable). The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude, or easement of a way over it, by a writ of *ad quod damnum*."

And in *Lade v. Shepherd*, 2 Stra. 1004, which was an action by the owner for trespass done by the appropriation of a part of a street which he had laid out on his land, the court say: "It is certainly a deduction to the public, so far as the public has occasion for it, which is only for a right of passage. But it never was understood as a transfer of the absolute property in the

soil." To the same effect is 2 Inst. 705; see Woolrych on Ways, 5.

A gift, then, of the right of way is not a gift of the earth and other materials that may exist within the boundary lines of the way, the right of which is given.

It follows that the defendant did not have the right to take rock from "the rocky bluff" aforesaid, to be applied to the macadamizing of the streets of Rome, and to the building of culverts. The defendant, no doubt, has the right to level the bluff so as to make the street passable the whole width of it. In the right to make the street is implied the right to do this. The defendant, having the right to make the street, has a right to do everything requisite to the making of the street. And this is the limit of the defendant's right. The fragments of rock that might result from the process of leveling the bluff would belong, not to the defendant, the owner of no more than the right of way, but to the complainant, the owner of the soil.

The next and only other question is, whether the complainant had the right to an injunction to stop the defendant from taking rock from "the rocky bluff" aforesaid, and applying it to the uses of the city of Rome in macadamizing streets and building culverts. And we think he had. Taking rock for the purpose of applying it to the uses aforesaid would amount to the commission of waste: Com. Dig., Waste, D, 4. And an injunction to stay waste has become almost a matter of course: *Moore v. Ferrell*, 1 Ga. 11; *Eden on Injunctions*, 198, 199.

We think, therefore, that an injunction to prevent the defendant from taking the rock, to be applied to the use aforesaid, should have been granted.

INJUNCTION AGAINST WASTE LIES, WHEN: See *Camp v. Bates*, 27 Am. Dec. 707, and cases cited in note 713.

THE PRINCIPAL CASE IS CITED in *Markham v. Howell*, 33 Ga. 508, and *Brown v. Hayes*, Id. (Supp.) 141, to the point that in cases of waste, injunctions are allowed as a matter of course.

THE PRINCIPAL CASE IS FURTHER CITED in *Denton v. Clark*, 125 Mass. 221, where the court say that unless the case could, as to the taking of rock, be considered substantially a case of quarry, the principal case cannot be upheld.

JORDAN v. PORTERFIELD.

[29 GEORGIA, 120.]

SHERIFF WHO REFUSES TO EXECUTE CAPIAS AD SATISFACIENDUM will not be protected because the writ was erroneously dated, so that at its date the person whose name it bore teste was not a judge of the court from which it issued, as such defect is a mere irregularity, and does not render the process void.

OFFICER, IN CASE OF MERE IRREGULARITIES IN PROCESS, refuses to act at his peril.

BULE against a sheriff to show cause why he should not pay over the amount due on a ca. sa. for failure to properly execute it. The sheriff made return showing several grounds, which were all overruled except one, viz., "Because the ca. sa. bears teste in the name of Garnett Andrews, who, at the date of its issue, was not one of the judges of the superior court of said state," which was sustained, and the rule refused. Plaintiff excepted.

T. W. Thomas and T. R. R. Cobb, for the plaintiff in error.

Peeples, and Cobb and Hull, for the defendant in error.

By Court, STARNES, J. Requiring this record to speak strictly for itself, it shows nothing more than a defect in the teste of this ca. sa. If the sheriff was to know that Garnett Andrews was not judge of the superior court in December, 1852, the date of the process, he should be required also to have known that this was a mere defect in the teste of the ca. sa.; that this teste was mere matter of form, not a substantial portion of the execution, and that the defect was therefore merely an irregularity, and did not vitiate that process. In such cases of mere irregularity of process, an officer refuses to act upon his peril.

We think the natural presumption in this case was, that there was a clerical mistake as to the date, and if the sheriff found that this defect was an obstacle in the way of executing the process, it was his duty to have brought it to the attention of the clerk, in which event the mistake might have been remedied. The idea of permitting him to shelter himself under such a plea, on account of failure to take a proper bond, cannot be tolerated for a moment.

Judgment reversed.

MERE FORMAL DEFECTS IN PROCESS DO NOT JUSTIFY officer's failure to properly execute it: See *Chase v. Plymouth*, 50 Am. Dec. 52, and cases cited in note 54.

UPSON v. ARNOLD.

[19 GEORGIA, 190.]

ON DISSOLUTION OF PARTNERSHIP, ASSIGNMENT BY RETIRING PARTNER, *bona fide*, of all his interest in the stock and effects to the remaining partners vests the same in the latter as his individual property, and it will be distributable accordingly, notwithstanding his subsequent insolvency; and this rule applies as well to limited as to general partnerships.

BILL to marshal assets. The defendant's testator, Arnold, during his life-time, entered into partnership with one Gresham, who subsequently sold out to Arnold all the assets of the firm, and Arnold assumed all the debts of the firm. Arnold then entered into partnership with one Upson as a limited partner. Upson subsequently sold out to Arnold, who assumed payment of the debts of this firm. Arnold died insolvent, leaving debts of the two preceding firms unpaid. This proceeding was brought, and the court decided that on the sale to Arnold in each case, the firm assets became individual assets, and that by reason of Arnold assuming the firm debts, they became in equity individual debts, and that all creditors of equal dignity of both firms, and of Arnold individually, should be paid *pro rata* from the combined assets. This decision plaintiff assigns as error.

Cone, for the plaintiff in error.

T. R. R. Cobb, for the defendant in error.

By Court, LUMPKIN, J. It is distinctly admitted by the able counsel for the plaintiff in error, that in case of general partnerships, if the retiring partner *bona fide* assigns all his interest in the stock and effects to the remaining partner, the same becomes thereby separate property, and will be distributable accordingly, notwithstanding the subsequent insolvency of the remaining partner; and that the sale made by Gresham to Arnold comes within this principle; and such undoubtedly is the law: Collyer on Part., Perkins's ed., 789.

He denies, however, that the same rule applies to the transfer between Upson and Arnold, which was a case of limited partnership. The learned counsel has cited no authority in support of such distinction. The act of 1837, Cobb's Dig. 585, recognizes none such; and the only reason assigned by the distinguished counsel for incorporating this exception upon the well-established doctrine of partnerships, that in case of general partnerships the retiring partner may still be sued for the firm debts contracted previous to the dissolution, which cannot be done in the case of limited partnerships.

We will not say that this constitutes no ground why a different practice should not prevail in the two cases. No writer, however, upon this head of the law has referred to any such distinction, not even when treating expressly and exclusively of the law of limited partnerships. No such point has been adjudicated by any court, English or American; and under such circumstances, we should not feel warranted in making such an innovation.

ON DISSOLUTION OF PARTNERSHIP, PARTNERS MAY AGREE *bona fide* that the partnership assets should become the remaining partner's property: See *Wilson v. Soper*, 56 Am. Dec. 573.

THE PRINCIPAL CASE IS CITED erroneously in *Manning v. Manning*, 61 Ga. 148.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

JAMESON v. PEOPLE.

[16 ILLINOIS, 257.]

PUBLIC ACTS OF LEGISLATURE, RECOGNIZING EXISTENCE OF MUNICIPAL CORPORATION and empowering it to act as a body corporate in issuing and negotiating obligations thereof, preclude inquiry into the question of the original legal organization of such corporation, and are conclusive on the question of its existence.

LAW WILL PRESUME IN FAVOR OF EXISTENCE OF MUNICIPAL CORPORATION, created for the public good and demanded by the wants of the community, where there has been a long-continued use of corporate powers, and an acquiescence on the part of the public.

Quo Warranto. The opinion states the case.

W. C. Goudy, for the plaintiffs in error.

J. H. Stewart, for the relator.

By Court, SKINNER, J. This was a *quo warranto* in the name and on behalf of the people of the state of Illinois, on relation of Booth Nettleton against Jameson and others. The information alleges that defendants below, as president and trustees of the town of Oquawka, are exercising the powers and franchises of a corporation without authority, and seeks to raise the question of the existence of such corporation.

The defendants below interposed several pleas, the first of which alleges substantially, in manner provided by the first division of chapter 25 of the revised statutes, the creation of the corporation in April, 1851, except that the vote upon the question of becoming a corporation under the statute, and upon the election of the board of trustees, was taken by ballot instead of *viva voce*.

The first plea alleges the election of the present board of trustees in 1854; the election of trustees from year to year after April, 1851, and the appointment by them of officers of the corporation from time to time; that the corporation, from April, 1851, up to the filing of the information, and for more than four years, was recognized as a public municipal corporation, and exercised the franchises and powers conferred upon such corporations by law; passed and enforced ordinances; levied and collected taxes; brought and defended suits; made contracts and incurred liabilities; and provided for and regulated the police of the said town of Oquawka; that the legislature of this state has twice recognized the existence of such corporation; that said legislature, by an act entitled "An act to authorize the town of Oquawka to subscribe to the capital stock of certain corporations therein named," approved the twenty-first of June, 1852, and by an act of the same title, approved February 8, 1855, recognized the existence of the said corporation.

The plaintiffs below demurred to the defendants' pleas, and the court sustained the demurrer. If any one of the pleas is a good answer to the information, the judgment of the circuit court should be reversed.

From the view we take of the case, it is unnecessary to decide upon the materiality of the mode of voting under the statute and the constitution of 1848.

The acts of the legislature referred to are public acts, and authorize the president and trustees of the town of Oquawka, as a corporation, to subscribe stock in a certain railroad company, and also to subscribe stock in a certain plank-road company, upon conditions in said acts mentioned; to issue and negotiate bonds of the corporation; to provide for paying interest on such bonds, and to levy and collect taxes upon property within the corporation.

These acts, recognizing the existence of the corporation, and empowering it to act as a body corporate, in issuing and negotiating obligations of the town, and upon the faith of which individuals may have invested their money, preclude inquiry into the question of the original legal organization of the town, and are conclusive upon the question of the existence of the corporation.

If there is no such corporation, all acts done under the supposed corporate powers are mere nullities; and no liabilities can exist by reason of contracts made in the corporate name, except, perhaps, against individuals who never contemplated

themselves incurring personal liabilities, by acts performed in an official capacity.

Were we to hold, after this acquiescence of the public, and these recognitions of the legislature, that the town remains unincorporated on account of some defect in its original organization as a corporation, what confidence could individuals have in the validity of securities emanating from these local authorities?

Municipal corporations are created for the public good—are demanded by the wants of the community; and the law, after long-continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence: *United States Bank v. Dandridge*, 12 Wheat. 64; *Dunning v. New Albany & Salem Railroad Company*, 2 Ind. 437; *Society of Middlesex Husbandmen v. Davis*, 3 Met. 133; *House v. House*, 5 Har. & J. 125. The law will incline to sustain rather than to defeat them.

It would seem incompatible with good faith, and against public policy, although irregularities may have intervened in the organization of the town, now to hold that it is not a body corporate; and we do not think the law requires us to do so.

We hold the first plea to be a justification to the defendants below for exercising the powers of trustees in the information alleged.

Judgment reversed, and cause remanded.

Judgment reversed.

THE PRINCIPAL CASE IS CITED in *Hamilton v. President and Trustees of Carthage*, 24 Ill. 24; in *People v. Farnham*, 35 Id. 506; and in *Swartout v. Michigan A. L. R. R. Co.*, 24 Mich. 394, to the point that the law indulges presumptions of the legal organization of municipal corporations after long-continued exercise of their corporate powers; and in *People v. Farnham*, *supra*, to the further point that where a municipal corporation has been recognized by acts of the legislature, all inquiry into the original organization thereof is precluded.

LOVE v. MOYNEHAN.

[16 ILLINOIS, 277.]

WHERE BILL OF EXCEPTIONS FAILS TO SHOW THAT EXCEPTIONS WERE TAKEN at the time to the rulings of the trial court in giving and refusing instructions, and the bill does not purport to contain all the evidence, the supreme court will not review the decisions of the lower court in giving instructions, or in refusing a new trial.

STATEMENT IN BILL OF EXCEPTIONS that "the above is nearly all the testimony given" is not sufficient to enable the appellate court to determine whether or not the verdict was correct.

THAT PLAINTIFF KEPT BAWDY-HOUSE IS NO DEFENSE in an action of trespass for entering a dwelling-house, and taking and carrying away the goods of the occupant.

WHERE HUSBAND COMPELS WIFE WITHOUT HER FAULT TO LIVE SEPARATE FROM HIM permanently, either by abandoning her or forcing her to leave him, and fails to make suitable provision for her support, she may acquire property, control her person and acquisitions, contract, sue and be sued in relation to them as a *feme sole*, during the continuance of such condition.

TRESPASS. The opinion states the case.

De Wolf and Daniels, for the appellants.

C. S. Cameron, for the appellee.

By Court, SKINNER, J. This was an action of trespass brought in the Cook circuit court to the November term, 1852, by Ann Moynihan against Love and Love, to recover damages for the defendants' entering the plaintiff's dwelling, and taking and carrying away her goods. The defendants plead in abatement the covverture of the plaintiff.

To this plea the plaintiff replied that in the year 1847 her husband deserted and forsook her without cause, and departed from the place of their abode without leaving her any means of support, and from thence thereafter had not corresponded with her nor returned to her, nor in any manner provided for her support, and that during all said time she had been compelled to rely wholly upon her own earnings for a support, and had by her own earnings supported herself and family during said time, and had not heard from, and did not know where her husband was, nor if he was still living; that during all said time of five years she had necessarily acted and traded as a *feme sole*, and that the property upon which the trespasses complained of in her declaration were committed had been acquired and earned by her since the said desertion of her husband; that her said husband had never been a resident of this state, but was and ever had been a resident of a foreign state.

The defendants took issue upon this replication, traversing all the facts therein alleged, and the plaintiff joined issue. The cause was tried by jury, and the issue was found for the plaintiff, and damages assessed against the defendants.

The defendants moved for a new trial, which motion was overruled, and judgment was rendered upon the verdict.

The motion for a new trial was based upon the grounds that the court refused to admit certain evidence on the part of the defendants; that the court gave improper instructions on the part of the plaintiff, and refused proper instructions on the part of the defendants; that the verdict was against the evidence; and that the damages were excessive. The bill of exceptions does not show that exceptions were taken at the time to the rulings of the court, in giving and refusing instructions, nor does the same purport to contain all the evidence; therefore, this court will not review the decisions of the circuit court objected to upon instructions, nor the decision of the court overruling the motion for a new trial.

The language in the bill of exceptions is, "The above is nearly all the testimony given." This is not equivalent to a statement that "this is all the evidence," or "the substance of the evidence," and is insufficient to enable this court to determine whether the verdict is against the evidence, or the damages excessive: *Buckmaster v. Cool*, 12 Ill. 74; *Dickhut v. Durrell*, 11 Id. 72; *Mann v. Russell*, Id. 586; *Sullivan v. Collins*, 13 Id. 85; *Dufield v. Cross*, Id. 699.

The record shows that the defendants in the trial offered to prove that one Spaids had sued one of defendants before a justice of the peace, to recover back rent by him paid for the premises occupied by the plaintiff, on the ground that this defendant, being the owner of the premises, and of whom Spaids had rented them, had turned the plaintiff out during the continuance of the lease.

And that defendants offered to prove that the plaintiff kept a bawdy-house. This evidence was objected to by the plaintiff; the objection was sustained, and the defendants at the time excepted. The court properly rejected the evidence. The plaintiff was a stranger to the suit of Spaids, and could not be affected by it. As to the offer to prove that the plaintiff kept a bawdy-house, the proof could be no justification or mitigation of a forcible entry into her dwelling, and taking and conveying away her goods.

The laws provide remedies for redress of wrongs, and for the punishment of offenders, and it is the duty of the citizen to resort to them. To take the law into one's own hands to redress supposed injuries, or to punish for public wrongs, is against the law and sound policy.

But it is contended that the replication is no answer to the plea of coverture, and that, therefore, judgment ought not to be

for plaintiff. This court will presume, as the bill of exceptions does not set out all of the evidence, that the facts alleged in the replication were proved, and if the facts alleged in the replication are sufficient to avoid the coverture alleged in the plea in any view of this case, the judgment must be affirmed.

This is an important question, upon which the decisions in England and in this country are conflicting, and is an open question in this court. It is a principle of the common law that marriage merges the civil rights of the woman; that she is thereby deprived of her separate legal existence, and that the husband and wife are but one person. She cannot, therefore, generally, during the life of the husband, sue or be sued, contract or be contracted with. The law presumes the husband and wife live together; that the wife is provided for and protected by the husband; that their interests are common and identical; and makes the husband liable for the wife's civil conduct while she remains under his control and protection.

When, by the fault of the husband, the wife is deprived of these, and all benefits accruing to her from the marriage, of any substantial importance, it is but reasonable that she should be restored to her civil rights, at least so far as is indispensable to that actual separate existence he has forced upon her.

The very necessity of cases which have arisen from time to time has produced and established exceptions to the rule that a married woman can neither sue nor be sued. These exceptions have been extended and narrowed according to the notions of courts and the temper of the times, and at this day no uniform rule exists, at least in this country, as to when a married woman can and cannot sue and be sued.

Under these circumstances, we feel at liberty to adopt such rule as will best meet the exigencies of society, and accord with the current of modern authority. In the case of *Rhea v. Henner*, 1 Pet. 105, the supreme court of the United States held that where the wife was left by the husband without maintenance or support, had traded as *feme sole*, and obtained credit as such, she was liable to be sued, and that the law was the same whether the husband had been banished for crime, or had voluntarily abandoned the wife.

In *Gregory v. Paul*, 15 Mass. 31, it is held that where the husband deserted his wife in England, and she came to Massachusetts, and maintained herself as a single woman for five years, the husband being still in England, the wife might sue as a *feme sole*.

In the same state it is also held that a woman living separate from her husband under a divorce *a mensa et thoro* may sue as a *feme sole*: *Dean v. Richmond*, 5 Pick. 461. The same court held that where the husband, living in New Hampshire, by his cruelty drove his wife from his house without providing for her, and she came to Massachusetts and maintained herself for many years, the husband having remarried in a foreign state, and married another woman, the woman might sue as a *feme sole*: *Abbott v. Bayley*, 6 Pick. 89.

In *Cornwall v. Hoyt*, 7 Conn. 427, it is held that where the husband abandoned this country in time of war, and joined the enemy, the wife remaining in this country might contract as a *feme sole*. In the case of *Gregory v. Pierce*, 4 Met. 478, the doctrine is recognized that desertion of the wife by the husband without providing for her, and without the intention of returning or living with her, will enable her to sue as a *feme sole*.

In the case of *Arthur v. Broadnax*, 3 Ala. 557 [37 Am. Dec. 707], the court held that where the husband had abjured the state, his wife remaining and doing business as a *feme sole*, she might sue upon and collect notes given her in her own name. The same doctrine is recognized in *James v. Stewart*, 9 Id. 855; and that to depart the state permanently with the intention of not returning is to abjure the state.

In *Roland v. Logan*, 18 Ala. 307, it is held that a married woman, having separated from her husband in another state, and removed to Alabama, and by her industry for several years maintained herself and family, the husband meantime residing in the state from whence she came, and asserting no claim to her acquisitions, may be regarded as a *feme sole*.

In South Carolina it is held that if the husband depart from the state for the purpose of residing abroad without intention of returning, such absence renders the wife competent to contract, sue and be sued, as a *feme sole*: *Bean v. Morgan*, 4 McCord, 148. The same doctrine is laid down in *Cusack v. White*, 2 Mill Const. 282 [12 Am. Dec. 669].

In Missouri it is held that where the husband in another state compelled his wife to leave him, and she went to Missouri and resided many years, her husband remaining in another state, and acted as a *feme sole*, she might acquire property, execute a valid release, sue and be sued: *Rose v. Bates*, 12 Mo. 47.

In Pennsylvania it is held that a married woman whose husband was a mariner, and had been absent more than two years, leaving her no means of support, might be considered a *feme sole*,

and receive a distributive share of her ancestor's estate: *Young v. Collins*, 2 Browne, 293.

In *Starrett v. Wynn*, 17 Serg. & R. 180 [17 Am. Dec. 654], it is held that if a husband deserts his wife and ceases to perform his marital duties, the acquisitions of property made by the wife during such desertion are separate estate, and that she may dispose of such property by will or otherwise.

These cases are undoubtedly relaxations of the rigid rules of the ancient common law, or rather exceptions to those rules, and are in conflict with many other cases, but are sufficient to show that the view we take is not wholly novel.

In case of abandonment of the wife by the husband, the reason of the rule of the common law concerning the marital relations ceases to exist; and with the reason, the rule should cease when demanded by the necessities of justice.

Why should a woman abandoned by her husband, and without means of living, not be permitted to provide for the necessities of herself and family by industry and economy, to acquire property, to control her own actions, and to protect her person and acquisitions? Illustrations of extreme hardship might be given without limit, but they are familiar to every observing person. It is true, the law provides for divorce from the bands of matrimony in certain cases, but many women have conscientious scruples against obtaining a divorce, and should not be compelled to violate conscience to acquire the mere ability of living by the fruits of their own labor.

The husband is discharged from his liability to provide for the wife if she, without cause, abandons him; and why the wife, being abandoned by the husband, should be kept continually subject to his plunder, or to that of his creditors, must be hard to answer: *Evans v. Fisher*, 5 Gilm. 569; *McCutchen v. McGahay*, 11 Johns. 282 [6 Am. Dec. 373]; *Rutherford v. Coxe*, 11 Mo. 347.

We hold the law to be that where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent and without expectation of again living together, and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a *feme sole*, during the continuance of such condition.

But if such separation is the fault of the wife, she can acquire no rights thereby.

No question is raised as to the propriety of interposing the defense in abatement instead of in bar to the action, and no opinion is expressed upon that point.

Judgment affirmed.

EXCEPTIONS NOT TAKEN IN COURT BELOW cannot be insisted upon in the appellate court: See *Burke v. Allen*, 61 Am. Dec. 642, note 647, where other cases are collected; see also *Duggins v. Watson*, 60 Id. 560; *Johnson v. Jennings*, Id. 323, note 330, where other cases showing what a bill of exceptions should contain are collected.

RIGHTS OF WIFE ABANDONED BY HUSBAND: See *Wright v. Hays*, 60 Am. Dec. 200, note 205, where other cases are collected. The principal case is cited in the following cases in support of the doctrine that where a wife is abandoned, without cause, by her husband, who fails to make suitable provision for her, she may acquire property, control it and her person, contract, sue and be sued, as a *feme sole*: *Prescott v. Fisher*, 22 Ill. 393; *Burger v. Belo-
log*, 45 Id. 74; *City of Peru v. French*, 55 Id. 324; *Mis v. French*, Id. 439; *Anderson v. Jacobson*, 66 Ill. 524.

MOIR v. HOPKINS.

[18 ILLINOIS, 212.]

ALL WHO AID, COMMAND, ADVISE, OR COUNTENANCE COMMISSION OF TORT by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner that they would be if they had done it with their own hands.

PRINCIPAL IS LIABLE FOR TORTS OF HIS AGENT, done in the course of his employment without a willful departure from such employment, although such torts are committed without the knowledge or approval of the principal.

WHERE PRINCIPAL DIRECTS HIS AGENT TO GET TEAM OF HORSES belonging to another, intending that the agent shall get them with the owner's consent, but the agent misapprehending the instruction takes the horses without leave, and in using them kills one of them, the principal will be liable for the value of the horse.

TRESPASS. The opinion states the case.

Stewart and Goudy, for the plaintiff in error.

C. M. Harris, for the defendant in error.

By Court, SKINNER, J. Trespass by Manassah Hopkins against William, James, and Robert Moir, for killing Hopkins's horse. The defendants pleaded not guilty. Upon the trial, the plaintiff proved by William Hopkins, his brother, that plaintiff had

worked for defendants with his team; that while he was at work he was taken sick, and went home, leaving his team with witness; that at night witness took the team home where plaintiff boarded and kept his team; that he put the team up and fed it, as directed by plaintiff; that the next day, plaintiff being still sick, witness worked for defendants; that on said day defendants wanted a team to haul lumber in their mill-yard; that early in the morning defendant Robert Moir directed witness to go and see if he could not hire a team to do the hauling; that witness accordingly endeavored to hire a team among the neighbors, but could not obtain one; that when defendant Robert Moir found that witness had been unsuccessful in hiring a team, he directed witness to go and get plaintiff's team; that witness then went and got plaintiff's team out of the stable, without plaintiff's knowledge or consent, and took it to the yard and used it for defendants, hauling lumber during that forenoon; that in the afternoon defendants wanted some bricks hauled from the country, a distance of eight miles, and that defendant James Moir directed witness to go and haul the bricks; that witness started with plaintiff's team, got the bricks, and in returning drove partly down a steep hill on the road; that as he got part way down, one of the horses was forced over the bank, fell, and was killed; that the horse was of the value of one hundred and fifteen dollars; that witness was a married man; that the plaintiff was his brother, was an unmarried man, lived with witness, and kept his team at the stable of witness; that for some time previous to the time plaintiff was taken sick, plaintiff had been in the employ of defendants with his team, hauling lumber for defendants; that plaintiff, on being taken sick, went to witness's house, and was there the next day when witness took the team; that plaintiff was sick and confined for some time after the horse was killed.

The jury found the defendant Robert Moir guilty, assessed the plaintiff's damages at one hundred and fifteen dollars, and found the other defendants not guilty. Motion for a new trial overruled, and judgment on the verdict.

The plaintiff in error, Robert Moir, assigns for error the giving of the first and second instructions asked for by the plaintiff below, and the refusal of a new trial. These instructions are as follows:

1. If the defendants, or either of them, directed the witness to go and get the plaintiff's horses, and he did go and get them in pursuance of such directions, without the assent, express or

implied, of the plaintiff, the person giving such instruction is a trespasser.

2. If a person injures personal property belonging to another, of which he has obtained possession by a trespass, he is liable to pay for such injury.

The first instruction, construed with reference to the facts before the jury, and in the sense evidently intended by the court and understood by the jury, is clearly good law. The plaintiff below, Hopkins, had with his team been in the employ of the Moirs; had left on account of being sick; was then confined, and his team was idle. The Moirs had sent their agent among their neighbors to hire a team, and he had returned unsuccessful. Robert Moir then directed the same agent to "go and get" Hopkins's team. He did so. The instruction is based on the hypothesis of a command by the Moirs to their agent to go and take Hopkins's team, and the evidence warranted the hypothesis. If, then, Robert Moir directed his agent to go and take Hopkins's team, and the agent did so, there can be no question of his liability for any injury done to Hopkins's property thereby.

The rule of law is, that all who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they had done the same tort with their own hands: *Judson v. Cook*, 11 Barb. 642; 1 Ch. Pl. 208; *Story on Agency*, sec. 455.

The general rule is, that the principal is liable for the torts of his agent, done in the course of his employment, although the principal did not authorize, or justify, or participate in, or even if he disapproved of them. If the tort is committed by the agent in the course of his employment, while pursuing the business of his principal, and is not a willful departure from such employment and business, the principal is liable, although done without his knowledge: *Story on Agency*, sec. 452; *Tuller v. Voght*, 13 Ill. 285; *Johnson v. Barber*, 5 Gilm. 425 [50 Am. Dec. 416], and cases there cited; *May v. Bliss*, 22 Vt. 477.

And it would seem that although Moir intended that his agent should get the owner's consent before taking his team, and the agent, misunderstanding the instructions given, took it without the owner's consent, he would still be liable: *May v. Bliss, supra*.

The second instruction is certainly the law, and the evidence sufficient to sustain the verdict.

Judgment affirmed.

LIABILITY OF PRINCIPAL OR MASTER FOR ACTS OF AGENT OR SERVANT.— This subject is discussed at length in the note to *Ware v. Barataria & L. C. Co.*, 35 Am. Dec. 192. See also *Johnson v. Barber*, 50 Id. 416, note 419, where several other cases are collected. In the last-named case it was decided that the principal is liable for his agent's fraud, tort, or negligence, though committed without the principal's participation or consent, if it is done in the course of the employment, and is not a willful departure from it. A principal is liable for the torts of his agent done in the course of his employment, although the principal did not authorize or justify or participate in them, or even where he disapproved of them: *Keedy v. Howe*, 72 Ill. 136, citing the principal case.

As to the joint liability of master and servant for the latter's negligent or tortious acts, see *Parsons v. Winchell*, 52 Am. Dec. 745, note 748, where other cases are collected. In *Fleet v. Hollenkemp*, 56 Id. 563, it was held that a druggist is liable for the act of his clerk, whether done through ignorance or by design, and whether with or without his knowledge, in intermixing a poisonous drug in compounding a prescription for a customer. In *McCoy v. McKowen*, 59 Id. 284, it was held that the principal is not liable for his agent's acts, where the latter exceeds his authority, and the acts are unsanctioned, and that the authority to commit a trespass cannot be implied. In *Barber v. Hall*, 60 Id. 301, it was decided that the principal must be held liable if injury is to result to another from the omissions or neglect of his agent.

WHERE AGENT MISAPPREHENDS PRINCIPAL'S INSTRUCTIONS, and acting under such misapprehension does an injury to a third person, which his principal never intended that he should do, the principal will nevertheless be liable, if the agent was, or supposed himself to be, acting in his principal's business: *Story on Agency*, 8th ed., sec. 455; *May v. Bliss*, 22 Vt. 477; *Luttrell v. Hazen*, 3 Sneed, 20. In *May v. Bliss*, the defendant, who was the owner of boards which were piled in the yard of a saw-mill, near a pile of boards belonging to the plaintiff, sent his servant to draw away his boards, and directed him to ask the sawyer which were the boards of the defendant. The servant inquired of the sawyer as directed, but by mistake carried away a part of the plaintiff's boards with those of the defendant. The court held that the defendant, having sent his servant to follow such instructions as the sawyer might give him, and the servant having received such instructions as induced him to take away the plaintiff's boards, it was the same as if the defendant had given the instructions himself, and that the defendant was liable for taking the boards, whether the fault was in the sawyer in not giving sufficiently specific instructions, or in the servant in not properly apprehending or not following them, the same as if he himself had taken the plaintiff's boards by mistake. In *Luttrell v. Hazen*, *supra*, the defendant directed his servant to cut some timber on the side of a hill towards the plaintiff's land. The servant at the time stated that he did not know where the lines were, and that he was liable to cut timber on somebody else's land. The defendant replied, "No, I reckon not." The servant cut a tree on the plaintiff's land, about a rod distant from the defendant's line. The defendant was held liable for the trespass. In delivering the opinion of the court, Caruthers, J., said: "Proper care to prevent injury to others must be taken. In this case, the employee was directed to cut timber in a certain direction, and in the execution of that order committed a trespass on the land of another. The line of defendant's land was not pointed out, though request was made by the servant to that effect. This was a case of carelessness, if not reck-

lessness, on the part of the defendant, and it will not do for him to say, after the wrong is done, that he did not know that it would occur, and therefore he should not be excused."

LIABILITY IN PUNITIVE DAMAGES OF PRINCIPAL FOR AGENT'S ACTS: See note to *Hagan v. P. & W. R. R. Co.*, 62 Am. Dec. 377, where this subject is discussed.

VAN BLARICUM v. PEOPLE.

[16 ILLINOIS, 364.]

IF IS NOT FOR COURT TO REFUSE TO ALLOW JUROR TO BE SWORD because he states that he has formed an opinion as to the guilt of the defendant, if such juror is accepted by the prisoner and is not challenged by the people.

INDICTMENT for larceny. On the trial, a bill of exceptions was taken, which stated that three of the jurors called stated, on examination by defendant's counsel, that they were of the jury that tried one Powers, who was indicted jointly with this defendant, and had formed an opinion, and had expressed it, as to the guilt of the defendant, but that they were accepted by the defendant, and thereupon the court, of his mere motion, and without any challenge by the people, caused said jurors to stand aside, to which decision the defendant excepted.

Blackwell, Ballingall, and Underwood, for the plaintiff in error.

W. H. L. Wallace, for the people.

By Court, CATON, J. The only question which we shall decide in this case is whether the court could set aside a juror because he had formed and expressed an opinion in the case, although he was not challenged by either party. The juror was examined, and stated that he had an opinion in the case, but notwithstanding this he was accepted by the prisoner, and before he had been accepted or challenged by the people the court ordered him to stand aside, and refused to allow him to be sworn on the jury, to which the prisoner excepted. In this we think the court erred. It does not appear but that the juror possessed the legal qualifications required by the statute, but that he was subject to challenge for favor. If the parties chose to have their cause tried by a prejudiced juror, it was not for the court to refuse them the right. I once heard a trial for murder where a majority of the jury stated that they had formed and expressed the opinion that the prisoner was guilty, and still he accepted and was tried by them, and was acquitted upon a technical

point, which his counsel evidently supposed those jurors had the capacity fully to comprehend and the firmness and integrity to give him the benefit of. So in this case the prisoner had a right to be tried by this juror, unless the people should challenge him. Whether he would have been challenged by the people, had he not been set aside by the court, we cannot know. It is enough that he might have been accepted by them to give the prisoner the benefit of the exception. That chance, at least, was his right, and because he was deprived of it he must have a new trial.

The judgment must be reversed and the cause remanded.
Judgment reversed.

THE PRINCIPAL CASE IS CITED in *Stampoeki v. Stefene*, 79 Ill. 306, to the point that a party has a right to be tried by a partial jury if he sees proper; and in *Territory v. Abeita*, 1 N. M. 547, to the point that a party has a right to be tried by an incompetent jury if he so desires.

CHICAGO & ROCK ISLAND R. R. CO. v. WARREN.

[*16 ILLINOIS, 502.*]

SHIPPER IS NOT BOUND TO TAKE FROM COMMON CARRIER REMNANT OF HIS GOODS in whatever condition they may be identified and offered to him. And where a person delivers to a railroad company for transportation one thousand seven hundred and sixteen pounds of rags, put up securely in bags, he is not bound to receive from the company, at the place of destination, five hundred pounds of rags, lying about loosely outside of its depot, without any proof that they are the same rags.

RESPONSIBILITY OF COMMON CARRIER DOES NOT END until there has been a delivery of the goods to the owner or consignee, or to a warehouseman for storage. The carrier's liability cannot end until that of the owner, consignee, or warehouseman begins.

WHERE COMMON CARRIER ALSO ACTS IN CAPACITY OF WAREHOUSEMAN in relation to the same goods, he must prove some open act of delivery before his liability can be changed from that of carrier to that of warehouseman.

ASSUMPTION. The opinion states the case.

Judd and Frink, for the appellants.

Hovey and Clarkson, for the appellees.

By Court, SCATES, C. J. The evidence very clearly shows the delivery by defendants of one thousand seven hundred and sixteen pounds of rags, put up securely in bags, at Joliet, to the plaintiffs, to be carried as common carriers by them, and delivered at Chicago.

On demand of the rags at Chicago, plaintiffs offer some five hundred pounds of rags, lying loosely about outside their depot, which were refused, and this suit is brought to recover the value of the whole lot.

I can see no grounds for the defense, neither in the facts nor the principles of the law regulating their liability as common carriers. They show that the bags were old and tender of thread; that the goods were not weighed at either end; that they were billed as a lot of rags, and tallied out as such at the place of destination. But how this can acquit them of a responsibility to carry safely, and deliver the goods, I am not able to perceive. The ground assumed is, that the tender, or pointing out the loose rags, was a delivery *pro tanto*, and discharges their liability as common carriers to that extent. I do not recognize this as presenting the first feature of a delivery.

An offer to deliver five hundred pounds of rags, without showing them to be the same rags, and in such condition, is no delivery; nor will it be regarded as an offer to deliver.

The defendants were entitled to their own rags. The bags were destroyed, as a means of identification, and plaintiffs have not shown that these were defendants' rags, even had the condition been no objection to receiving them. Defendants were entitled to their own rags, and were not bound to take other rags in their stead.

But the condition of the rags was a substantial objection. I do not pretend that every failure to carry safely, and in like good order as received, will subject a common carrier to liability for the full value, and compel him to answer as a purchaser. Nor is a shipper bound to take any and every remnant of his goods in whatever condition it may be identified and offered to him, short of total destruction. There is a medium defining their mutual rights in this respect.

The responsibility of a common carrier does not end or change into that of a warehouseman by mere delivery at the usual dock or wharf of a vessel, landing of a steamer at the way-station, or railroad at its way-station or final depot. There must be such actual delivery as satisfies and fulfills the contract for carriage and delivery to the owner or consignee. The carrier's liability cannot end until that of the owner, consignee, or warehouseman begins, and it can make no difference that the carrier, by discharging his liability as such, assumes the new relation of storer. Merely reaching the end of the voyage or transportation, and delivering the goods out of the vessel or

vehicle in which they were carried, will not fulfill the one duty nor create the other: *Crawford v. Clark*, 15 Ill. 561. There must be an actual or legal constructive delivery to the owner, or consignee, or to a warehouseman for storage.

Railroad companies may, and doubtless do, act in relation to the same goods both as common carriers and warehousemen, and these relations and liabilities are very different in the strictness and extent of responsibility. We cannot sanction the idea for a moment that the duties and obligations of carriers end the instant a train stops, either at the way or final station of its route. This would open the door to endless frauds, thefts, and destruction or loss by the way, and a change of the carrier's liability into that of mere storage, without any possibility of the owner proving that they did not arrive safe. The carrier's servants employed in the transportation are seldom the same charged with the care and custody of the same articles when and while in their charge on storage. But even had the same servant charge of the goods for the carrier in both characters, and under both liabilities, there should be some open act of delivery, capable of proof of this change of relation and liability. This proof must, of necessity, rest upon the carrier. If, in the course of the particular line of transportation, the carrier stores at the station in the same car in which goods are transported, he would be able and ought to know that the car had been separated from the train, and placed in a proper or its usual station for storage and put in charge of the proper person. Goods may not be thrown down in a station-house, or on a platform at their destination, in the name and nature of delivery. The responsibility of the carrier must last until that of some other begins, and he must show it. The case before us is a good illustration. The shipping of the goods is shown, but their transportation to and arrival at Chicago is nowhere in the record to be found. The plaintiffs prove that the "rags were billed on the freight-list as a lot of rags, and were tallied out at the depot" in Chicago. How, when, and where, and how many of them? The record answers some of these inquiries. They were thrown loosely outside the depot (a small part only), and before the defendants could reach the depot to receive them, after notice, supposing those shown to be the same that were shipped: See *Ostrander v. Brown*, 15 Johns. 39 [8 Am. Dec. 211]; *Chickering v. Fowler*, 4 Pick. 371; *Hyde v. Trent and Mersey Nav. Co.*, 5 T. R. 389; Story on Bail., secs. 509, 538-542; Angell on Carriers, secs. 282-288; 2 Kent's Com.

604, 605; *Hill v. Humphreys*, 5 Watts & Serg. 128 [39 Am. Dec. 117]; *Gibson v. Culver*, 17 Wend. 305 [31 Am. Dec. 297].

Such a delivery is no delivery at all in law, according to the above and numerous other authorities.

Judgment affirmed.

DELIVERY BY COMMON CARRIER, WHAT CONSTITUTES SUFFICIENT: See *Norway P. Co. v. Boston & M. R. R.*, 61 Am. Dec. 423, note 432, where other cases are collected; *Knowles v. Atlantic & St. L. R. R. Co.*, Id. 234. A common carrier, whose duty as such has terminated, cannot lay aside the goods which he has carried, and neglect them, but he still remains liable for the care and custody of the property until he has delivered it to the owner or his agent, or has placed it in such a situation as may fairly be regarded as equivalent to a delivery: *Smith v. Nashua & L. R. R.*, 59 Id. 264. The responsibility of a carrier does not end until that of the owner, consignee, or warehouseman begins, and there must be an actual or legal constructive delivery to the owner or consignee or to a warehouseman for storage in order to discharge the carrier from liability as such: *Chicago & N. W. R. R. Co. v. Sawyer*, 69 Ill. 289; *Faulkner v. Hart*, 82 N. Y. 417, both citing the principal case.

COMMON CARRIERS AND WAREHOUSEMEN, RESPECTIVE LIABILITIES OF: See *Cox v. O'Riley*, 58 Am. Dec. 633, note 637; *Chase v. Washburn*, 59 Id. 623, note 629; *Norway P. Co. v. Boston & M. R. R.*, 61 Id. 423, note 432, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *McMillan v. Michigan S. & N. I. R. R. Co.*, 16 Mich. 105, to the point that a railroad company is held to the same measure of responsibility as a carrier by water, where the property carried is left outside its depot.

DAVENPORT v. YOUNG.

[16 ILLINOIS, 548.]

WHERE STATUTE AUTHORIZES SALE OF REAL ESTATE OF DECEDENT for the payment of his debts, a sale made by the administrator, without proving that there were any debts owing, is invalid, and conveys no title.

PROBATE COURT MUST DETERMINE WHETHER THERE ARE DEBTS against estate of a decedent or not; the legislature have no constitutional power to find and determine that fact. And if the probate records and files fail to show that there were such debts, parol evidence is not admissible to prove their existence.

CONVEYANCE BY ADMINISTRATOR WHICH DOES NOT PURPORT TO CONVEY any estate or interest except his own is ineffectual to pass the interest or estate of his intestate.

ERROR to Cook county common pleas. The opinion states the case.

G. Manniere and E. S. Williams, for the plaintiff in error.

C. Beckwith, L. Trumbull, and R. S. Blackwell, for the defendants in error.

By Court, SCATES, C. J. The only questions deemed important in the decision of this case are presented as objections to the sufficiency of plaintiff's title. His title was derived through a purchase from Seth Paine, which is claimed to have been made by him as administrator *de bonis non* of the estate of D. L. W. Jones, deceased, under and by virtue of an act of the legislature, which became a law on the sixth of December, 1836. The act was passed upon the petition of James Whitlock, administrator, who, however, did not act under it. He was afterwards removed, and Paine, who had intermarried with the widow of Jones, was appointed, and sold.

We deem it unimportant to the decision to examine whether the office of administrator survived, and with it the power conferred by this act, as also the question in relation to filing the widow's consent, before the sale, and the giving bond and surety, as required by the act. Waiving these, there are insuperable objections to the title set up. We shall confine ourselves to two deemed sufficient.

The first is, that the facts contemplated by the statute, upon which the power to sell depended, were not shown to exist; and second, the administrator never did sell and convey. In relation to the first, the act authorized the administrator "to sell, at public or private sale, such of the real estate of said decedent as is situated within this state and the territory of Michigan, the proceeds whereof shall be applied to the liquidation of the debts of said decedent," and the residue to be invested, etc., for the widow and heir, with the advice of the judge of probate. The supposed existence of debts to be paid, and an insufficiency of personal assets to do so, is the apparent reason for granting this power, and the object of it to raise means to pay them. The legislature had no constitutional power to find and determine the fact that there were debts owing: *Lane v. Dorman*, 3 Scam. 238 [36 Am. Dec. 543]; *Edwards v. Pope*, Id. 470; *Mason v. Wait*, 4 Id. 134; and could, therefore, only grant power to be exercised, if, and when, the fact should be established in due course of administration. It could not depend upon the private knowledge of Whitlock or Paine, as administrator, nor upon their will and pleasure. None have been shown by the probate records and files, and none are therefore supposed to exist.

The court very properly excluded parol evidence, offered to supply this fact. The court on the trial in this suit had no power to settle, ascertain, adjust, allow, and sanction debts against the estate. Many difficult questions might arise, the

statute of limitations might be a defense to their allowance, and it would be impossible in this collateral manner to draw in question the settlement of that estate, even had the court jurisdiction. Whether before or after the sale of the land, still it was essential to the exercise of the power of sale to establish and have the debts allowed regularly before the proper tribunal having jurisdiction. How could the judge of that court sanction any investment of a surplus without having evidence of what that surplus might be. The case of *Lane v. Dorman*, in its several visits to the court, has met and settled these points. See S. C., 1 Gilm. 143; *Dorman v. Test*, 13 Ill. 127.

Suppose this not to be a naked power, but one which would survive as being coupled with an interest in the creditors, to have payment of their debts by its exercise. Yet having failed to show that there were such creditors, it is stripped of that characteristic, and would stand as a naked power as to the widow and heir. It is such a power as the law will watch with jealousy, and the party claiming under it will be expected and required to show that the contingency had happened, or the facts existed, upon which its exercise depended.

2. Both the articles of agreement for the sale and the conveyance itself are made by Seth Paine, describing his identity as administrator, and his wife joins in them both. The recitals will not help the deed. It does not purport even to be a conveyance of the estate or interest of Jones, deceased, but that of the grantors. They covenant, warrant, and defend, and sign and seal for themselves. We must read, interpret, construe, and understand the deed, by and from its language and terms. These all appear, notwithstanding the description and recitals, to be the individual acts and covenants of the grantors, and of their estate for the benefit of the widow and heir of Jones. It might have presented a much stronger case had the recitals and description of Paine's person or character, as administrator, been omitted altogether, and the body of the deed have described the estate and interest sold and conveyed as that of the estate of the decedent. I am constrained, by terms and phraseology of the deed, to believe the intention was to sell and convey the land generally under the power, without regard to the debts of the estate, but with a view to benefit the minor heir by reinvestment. This I gather from recitals, in connection with the history of the case as disclosed in the record. But in looking beyond the deed, this would be very doubtful. But admitting it to be so, no power is conferred by the act, upon the adminis-

trator, as such, to dispose of the land for the purpose alone of the benefit of the widow and heir, or its control and management on their account. His authority, acts, and duties in reference to them and their estate and interest, grew incidentally out of his power to sell and pay the debts as administrator. If his power did not arise on that account and for that purpose, he had none to sell at all; and so we think he had not.

The objection to reading the journals to establish a fact in relation to the petitioner and petition, etc., for the act, was properly overruled. This court has received them for purposes connected with the passage of the laws: *Spangler v. Jacoby*, 14 Ill. 297 [58 Am. Dec. 571], and authorities there referred to.

In pursuance of the agreement of the parties, this cause is remanded for a new trial, notwithstanding the judgment here.

Judgment affirmed.

STATUTES AUTHORIZING EXECUTORS TO SELL REAL ESTATE must be strictly complied with: See *Reynolds v. Wilson*, 60 Am. Dec. 753, note 755, where other cases are collected; *Tucker v. Harris*, 58 Id. 488, note 503. An order for the sale of real estate by an executor is invalid unless the directions of the statute have been strictly complied with, and such compliance must be shown by the record: *Gelstrom v. Moore*, 59 Id. 254; *Tucker v. Harris*, 58 Id. 488, note 503, where other cases are collected.

SUFFICIENCY OF EVIDENCE OF DEBT TO WARRANT ISSUANCE OF LICENSE to sell decedent's realty is a matter within the jurisdiction and discretion of the probate judge: *Merrill v. Harris*, 57 Am. Dec. 359. The legislature has no constitutional power to determine whether or not there are debts owing by by an estate of a decedent, and evidence independent of the probate records, showing that such debts exist, is inadmissible: *Rosier v. Fugan*, 46 Ill. 406, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Coffing v. Taylor*, 16 Ill. 474, to the point that, in the absence of all evidence to the contrary in a deed, if two rights appear, one of the grantor's own and one in a representative character, the deed will be presumed to operate on the party's own right.

GALENA & CHICAGO UNION R. R. CO. v. FAY.

[16 ILLINOIS, 558.]

PRINCIPLES OF LAW LAID DOWN in *Galena & O. U. R. R. Co. v. Yarwood*, 15 Ill. 468, re-examined and fully approved.

DOCTRINE IN RELATION TO MUTUAL NEGLIGENCE OF PARTIES IN CAUSING INJURY is applicable to carriers of passengers by railroad.

PASSENGER TAKES ON HIMSELF RISK OF MODE OF TRAVEL HE ADOPTS; but the care, vigilance, and skill on the part of the carrier must be adapted to the motive power and means employed by him. The carrier and the passenger owe reciprocal duties to each other.

CONDUCT AND EXPRESSIONS OF PASSENGERS IN CAR, AT TIME OF ACCIDENT, are admissible in evidence as tending to show how the circumstances of apparent danger impressed others, and to vindicate from rashness the conduct of the plaintiff in leaping from the train, whereby he received the injury complained of.

WITNESS MAY BE ASKED, FOR PURPOSE OF CONTRADICTING ANOTHER WITNESS; whether the latter has made a different statement on another occasion, when a proper foundation has been laid by a preliminary question as to the time, place, and person involved in the supposed contradiction, and the matter inquired of is relevant to the issues in the case.

COMMON CARRIERS OF PASSENGERS ARE NOT INSURERS AGAINST ALL ACCIDENTS.

CHARGE TO JURY THAT COMMON CARRIERS OF PASSENGERS ARE ONLY LIABLE for the want of such care, diligence, and skill as is characteristic of cautious persons is too narrow, and does not express their full degree of liability as such carriers. The care and diligence of "cautious" persons is too indefinite and uncertain a form of expression to be used in a charge to the jury.

PASSENGER ON RAILROAD CAR, WHOSE CARELESSNESS OR IMPRUDENCE CONTRIBUTES in any way to produce the injury complained of, cannot recover therefor.

WHERE PASSENGER'S WANT OF CARE CONCOURS WITH NEGLIGENCE OF RAILROAD COMPANY in producing an injury to the former, he cannot recover for it.

RAILROAD COMPANY MAY SHOW THAT INJURY TO PASSENGER IN LEAPING FROM CAR was the result of his carelessness or culpable negligence prior to the accident.

CARRIERS OF PASSENGERS ARE NOT ANSWERABLE FOR LOWER DEGREES OF NEGLIGENCE on the part of their passengers until they amount to rashness and recklessness.

CARRIERS OF PASSENGERS ARE REQUIRED TO USE HIGHEST DEGREE OF CARE, diligence, vigilance, and skill in the selection of materials, construction of their vehicles and other means of transportation, and for their conduct and management, repair and preservation of them, with a view to the comfort, safety, and transportation of passengers and their baggage, and they are liable for slight neglect or carelessness in any of these particulars, qualified by the reciprocal duty of the passenger that his want of ordinary care does not cause or contribute to produce the injury.

ACTION on the case for personal injuries. The testimony showed that Fay, the plaintiff below, got on the appellants' cars at Elgin to ride to Clinton. On getting on the train, he was told by the conductor "that the passenger-car was full, and they must, or had better, get into the baggage-car." He thereupon went into the baggage-car. Soon after the cars left Elgin, the plaintiff below and his companions commenced playing and scuffling. After the train had run about a mile and a half, the hind trucks of the second-class car and the forward trucks of the first-class car were thrown from the track.

The brakes were put down, and the train was stopped as soon as possible. The baggage-car was not off the track, nor in any danger. Just before the accident happened Fay had chased one of his companions out of the baggage-car into the second-class car. At the time of the accident he was either in the second-class car or on the platform, and jumped from the train and received the injuries complained of. The passengers who remained in the cars were not injured. On the trial, Fay's counsel asked a witness who was in the first-class car at the time of the accident what was the conduct of the passengers in that car indicating whether or not there was or was not alarm among them, and what exclamations were made, if any, by passengers in that car indicating alarm. Objections to these questions were overruled by the court. One Yarwood, a witness for Fay, swore that he did not tell Wiggins or Brewer, on the cars, that he and his companions, among whom was Fay, had been having a regular tear. Counsel for the railroad company asked Brewer, who was a witness for the defendant below, this question: "Did Yarwood, upon coming into the first-class passenger-car, state to you, or to Captain Wiggins in your presence, 'We have been having a regular tear'?" To this question the court sustained an objection. The following instructions were asked for by the defendant below, and were all refused, except those that were modified by the words placed in brackets, which were given as modified: 3. The defendants, as common carriers of passengers, are not insurers against all accidents, but are liable only for the want of such care, diligence, and skill as is characteristic of cautious persons; and if the defendants exercised such care and diligence in the transportation of the plaintiff, then he cannot recover. 5. If the jury believe from the evidence that the plaintiff, while on his passage from Elgin to Clinton, was guilty of carelessness, and unnecessarily exposing himself to danger, by wrestling or scuffling on the cars, or by imprudently and unnecessarily passing from one car to another while the cars were in motion, and that such carelessness or imprudence contributed in any way to produce the injury, then the plaintiff cannot recover. 6. If the jury believe from the evidence that the plaintiff, while on defendants' cars, imprudently and carelessly exposed himself to danger by scuffling or playing, and that the injury to him was the result of such carelessness or imprudence, or that such carelessness or imprudence in any way contributed to produce the injury, then the plaintiff cannot recover, even though the jury may believe that the defendants

have also been guilty of negligence. 7. If the jury shall believe from the evidence that the plaintiff was guilty of any want of reasonable care while a passenger upon the defendants' cars, and that his want of care concurred with the negligence of the defendants in producing the injury, then the plaintiff cannot recover. 11. If the jury believe from the evidence that the plaintiff leaped from the cars of the defendants under circumstances that would not have justified such an act on the part of a prudent, careful man, and that the injury was the result of such leaping, then the plaintiff cannot recover. 12. If the jury believe from the evidence that the plaintiff leaped from the defendants' baggage-car while said car, and the locomotive and tender were upon the track, and while the cars were moving slowly, these are facts from which the jury may presume that the plaintiff was guilty of imprudence and carelessness in leaping from said cars. 13. If the jury shall believe from the evidence that the plaintiff [without reasonable cause, rashly] leaped from the cars of the defendants when he was in no peril, and leaped carelessly and recklessly, and that his careless and reckless manner of jumping *contributed to produce* [caused] the injury, then the plaintiff cannot recover. The court struck out the words in italics, and inserted the word in brackets. 15. If the jury believe from the evidence that previous to taking passage on the defendants' cars, at the depot in Elgin, the plaintiff was directed by the conductor to take his place in the baggage-car, because there was not room for him in the first-class passenger-car, and that the plaintiff did go into said baggage-car at the time of starting, and whilst on the way from Elgin to Clinton he left said car, without any reasonable cause, and passed carelessly [and recklessly] from one car to another, and that the injury to the plaintiff happened in consequence [of his leaving the car so assigned to him, and, without reasonable cause, leaped from the cars, whereby he was injured], then the plaintiff cannot recover. 16. That the plaintiff must prove his cause as stated in his declaration, and if the jury shall not believe that the car in which the plaintiff was riding, in his passage from Elgin to Clinton and immediately previous to the plaintiff's leaping from the car, was thrown off the track by the negligence of the defendants, and was proceeding over the ties, and was tossed about so that the plaintiff's life or limbs were in great peril, or that the said plaintiff's life or limbs were there or then greatly jeopardized and endangered by remaining in the cars, then the

plaintiff cannot recover. 17. If the jury believe from the evidence that the injury to the plaintiff complained of in this action was the result of the negligence or want of care of both the plaintiff and the defendants, the jury should find for the defendants. 18. If the jury believe from the evidence that Fay did not hear whatever noise there might have been in the passenger-car, when the same ran off the track, then the jury should disregard the evidence of such noise as influencing the conduct of Fay [otherwise than showing the reasonableness of his fear of danger]. 19. The plaintiff, as passenger upon defendants' railroad, must be presumed to have taken upon himself the risks necessarily incident to the mode of travel which he adopted, and if without fault of the defendants, or by a concurrence of the fault, negligence, or want of care of both plaintiff and defendants, the plaintiff was injured, the jury should find for defendants. The court also gave the following in lieu of others asked by the defendant below and refused. In lieu of No. 7, given above, it gave this one, numbered 4: If the jury believe from the evidence that the plaintiff was guilty of a want of reasonable care at the time the accident happened, or without reasonable cause or apprehension of danger rashly leaped from the cars, by which he was injured, he ought not to recover, although the defendants' negligence contributed to the injury in such case. In lieu of No. 16, given above, it gave this one, numbered 9: But the court states that the plaintiff must prove his case, as stated in some one of the counts in his declaration, to the satisfaction of the jury, before the jury ought to find in his favor. This last one is also numbered 21 among those given by the court, at the request of the plaintiff below: 9. The prudence and due care required of the common carrier by law is of the highest order; the utmost possible skill, care, diligence, and watchfulness to the safety of the passengers, and in this sense the words "due care, etc., " as mentioned in the defendants' instructions, is intended. The prudence required of the passenger is simply such as ordinary men usually exercise in like circumstances, and if the jury believe from the evidence that by reason of the omission or neglect of the defendants or any one of their servants, the cars were thrown off the track while under way, and the plaintiff was thereby put in danger, and, to save himself, leaped from the car, and thus received the injury, the defendants cannot excuse themselves from responsibility by reason of any act of the plaintiff, unless

they show, first, that such act helped to produce the injury, and secondly, that such act was so imprudent, rash, or heedless that the exercise of such prudence as the average of mankind possess would have prevented the plaintiff from doing the act. 10. The defendants having admitted to be common carriers for hire, they are, and were at the time, bound to use the utmost care, foresight, and diligence in providing of safe, sufficient, and suitable conveyance, in order to prevent those injuries which human care, diligence, and foresight could guard against; and if the plaintiff's injury happened by reason of a defect in the road of defendants, which might have been discovered and prevented by a careful and thorough investigation thereof immediately after the eastern train had passed, and before the train coming east with the plaintiff ran over the same track going east, then such accident must or ought to be ascribed to the negligence of the defendants or their servants. But if the jury believe the accident did arise from a hidden defect of the road, which no human care, skill, foresight, or careful and prior examination of the road, at the point where the accident happened, could have discovered, and which could not be guarded against by the exercise of a sound judgment and a vigilant foresight, then the defendants are not liable. On the other hand, if the injury was the result of the slightest neglect of the defendants or their servants, then they are liable therefor, unless the jury further believe from the evidence that the plaintiff's act of jumping from the car was rash, and without reasonable grounds of fear of injury by remaining in the car any longer.

E. Peck and J. F. Farnsworth, for the appellants.

T. S. Dickey and S. Wilcox, for the appellee.

By Court, SCATES, C. J. As the injury happened at the same time, and the facts are so much like those in the same plaintiffs against L. H. Yarwood, before us in 15 Ill. 468, as to involve the same principles of law, we have again carefully examined the principles there laid down, and fully approve them, believing them sustained by settled adjudications and text-writers. It is objected that the doctrine in relation to the mutual negligence of the parties causing the injury is not applicable to carriers of passengers by railroad, and should not be applied as in that case. To our mind, there is no apparent ground or reason for distinction or difference. The degree of responsibility and care between goods, or inanimate things, and reasonable beings having volition, is found in the difference between property and

persons, and is not referable at all to modes of conveyance. I know of no case making any distinction. As to the latter, Justice McLean well remarks in *McKinney v. Neil*, 1 McLean, 550, that "we are surrounded with dangers at home and abroad, and they are greater when we travel than while we remain stationary. In some modes of traveling these dangers are greater than in others. They may be greater on water than on land; on a fast line of stages than on a slow one; and every passenger must make up his mind to meet the risks incident to the mode of travel he adopts which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance. This is the only guaranty given by the proprietor of the line." If one will take passage in a balloon, he should not expect or require the conductor to insure his life, limb, or safe passage, nor to do more than exert the greatest degree of care, with competent skill in that mode of sailing. Nor can passengers by steam-power, either in boats or on railroads, expect the same degree of security that they would enjoy by wagons, canal-packets, or stage-coaches. The degrees of care, vigilance, and skill are the highest, and the responsibility is for the least neglect known to the law, short of insurance. And these in their application have respect to the particular mode of travel or transportation offered. The care, vigilance, and skill must be adapted to the motive power and means. A servant well qualified to steer a boat or manage a team might be totally unfit to manage steam or regulate the running of a boat or locomotive. The means should be reasonably adapted to the end, and the care and skill to the use of the means, whether of one or another mode of transportation. These differences we recognize as within the rule of diligence. But while the care, skill, and diligence are judged of in reference to what is required by the dangerousness of the particular mode, we can see no propriety or justice in relaxing from a proportionate care on the part of passengers, according to the increased hazards of the mode of transportation adopted by them. This is surely reasonable, and must continue to be a reciprocal duty to carriers by railroads: See *Haring v. New York & Erie R. R. Co.*, 18 Barb. 14.

Upon the evidence, contradictory as it is, we shall not interfere with the verdict. Upon the question of a special passage in the baggage-car, the evidence in the case, unlike the case of *Yarwood* referred to, is conflicting. The jury were judges of what was before them, and they have settled the facts, under instructions.

The conduct and exclamations of passengers in the cars were not improperly admitted as tending to show how the circumstances of apparent danger impressed every one, and, to some degree, explain defendant's conduct, and vindicate it from rashness and imprudence from undue alarm. It is impossible for a witness to convey such scenes to the mind, and their effect and influence upon it. Such general conduct, with the exclamations involuntarily thrown out by appearances of imminent peril, may be regarded as a part of the *res gestae* for this purpose.

A proper foundation for asking Brewer for the statement of Yarwood had been laid, by the preliminary question to an answer of Yarwood, for the purposes of impeachment. The matter was relevant as tending to show a contradiction, and the time and place and persons connected with the conversation or statement were certain and specific. Brewer was the person, and it was on the cars, just before the accident. All the prerequisites laid down by Mr. Greenleaf are found in the questions put to and answered by Yarwood: 1 Greenl. Ev., sec. 462. The question should have been allowed, and answered by Brewer.

The first part of the third instruction asked by plaintiffs in error we again sanction as correct, but the latter part, we will again repeat, as we said in *Galena etc. R. R. Co. v. Yarwood*, 15 Ill. 469, "is too narrow, and does not express the full degree of plaintiffs' liability as common carriers of passengers." We see no propriety in attempting new definitions, or departing from the common and well-understood terms for expressing the degrees of both diligence and negligence. When parties persist in attempts to use new and indefinite expressions, we cannot but be strongly impressed with the belief that the usual ones do not suit their purpose. The care and diligence of "cautious" persons is indefinite, uncertain, and no two minds would agree as to the degree indicated.

The fifth, sixth, and seventh instructions asked by appellants were fair statements of the law, and should have been given. Number four, given in lieu of number seven, is too restrictive. It confines the want of reasonable care to the moment of the accident, and excludes all consideration of a previous want of care; at least, so we understand it. Now, the leap at the moment taken, and under the circumstances, might have been prudent and defensible, and yet a previous want of care, or culpable negligence, may have brought him into the situation to make it necessary and justifiable. Previous acts of appellants, and want of care, diligence, and skill in building, equipping,

running, repairing, and operating the road up to the moment of the accident, so far as they tended to show culpable negligence in the alleged injury, were proper subjects of inquiry, and might be embraced within instructions. So, in like manner, they have a right to show that the injury was the consequence or result of defendant's want of care or culpable negligence at any time, or that such negligence contributed to produce it. Suppose he should have done an act hours before, or miles distant from the time and place of the injury, which contributed to it, can this be separated and excluded from our consideration? Suppose he had carelessly placed articles upon the platforms of the cars, liable to be shaken off and across the track, and they were carelessly suffered by the servants of the company to remain until thrown under the wheels, and the cars be thrown off the track thereby, would a justifiable leap after the necessity occurred exculpate his previous carelessness, although he might show theirs? Giving such instructions does not depend upon the sufficiency of the evidence offered, but upon the fact that there is evidence tending to establish the fact alleged. Here there was evidence to that point in the defense, and the court should have instructed the jury of its legal consequences upon defendant's rights in case they believed such negligence proved upon him. This was fully discussed and settled in principle in *Galena etc. R. R. Co. v. Yarwood*, 15 Ill. 468, and the *Aurora Branch R. R. Co. v. Grimes*, 13 Id. 585. This last case has also settled the principle contained in the eighth and ninth instructions asked, and is fortified by the case of *Haring v. N. Y. & Erie R. R. Co.*, 13 Barb. 14, and *Moore v. Abbot*, 32 Me. 49: Angell on Carriers, sec. 556, 557. These instructions were proper, and should have been given.

After a careful consideration of the eleventh and twelfth instructions, we are unable to detect any substantial objection to them, and think they should have been given.

The thirteenth and fifteenth were proper, and should have been given. We think the modifications given by the court in lieu of those asked have expressed too strong a degree of carelessness. It is enough in law, to constitute a defense, that the negligence and carelessness caused or contributed to the injury complained of. Where these are shown, courts and juries cannot adjust their degrees and gauge their effects, nor will the law hold carriers to answer for all the lower degrees, until they amount to rashness and recklessness. This would add to the

highest degree of care imposed by law upon carriers an additional responsibility for the negligence and carelessness of passengers short of gross negligence. But such is not the law, and we cannot sanction instructions so stating it; nor shall we here undertake to say how slight a degree will destroy the right of reparation.

The ninth, given in lieu of the sixteenth asked, was proper.

The sixteenth belongs to a class condemned by this court in *Galena etc. R. R. Co. v. Yarwood*, 15 Ill. 468, and is properly modified in No. 21.

The seventeenth and nineteenth should have been given. The eighteenth was properly modified.

The degrees of care of the plaintiffs, and negligence of defendant, as presented in the ninth and tenth instructions given for defendant here, are not accurately presented. The "utmost possible care," and "slightest neglect," are superlative terms, unsafe and improper to be indulged in, as expressive of the requirements of the law, while it requires, at the same time, the highest degree of the one, and charges for slight neglect. So for the other party, prudence, "simply such as ordinary men usually exercise," is very indefinite, and may fix no rule or standard at all in law.

As the cause must be again tried, we have examined and discussed these instructions in detail, numerous as they are, in the sincere hope to present what we regard as the settled principles of law applicable to such injuries.

We can but think the principles all plain, and easily to be understood, as laid down in the decisions of courts; and if these were plainly and fairly drawn out into instructions, without embellishments of superlatives, or garnishment of partial statements of facts, juries would easily comprehend the mutual duties and liabilities of the parties, and adjust their rights.

Carriers of passengers are not insurers of life, limb, or against loss, damage, or injury, as carriers of goods are, except for acts of Providence or the public enemy; but they are required to use the highest degree of care, diligence, vigilance, and skill in the selection of materials, construction of their vehicles, and other means of transportation, and for their conduct and management, repairs and preservation of them, with a view to the comfort, safety, and transportation of passengers and their baggage; and they are liable for slight neglect, or carelessness in

any of these particulars, qualified, however, by the reciprocal duty of the passenger that his want of ordinary care does not cause or contribute to produce the injury.

Judgment reversed, and cause remanded for new trial.

Judgment reversed.

SKINNER, J. I am unable to concur in all the conclusions and reasoning of the foregoing opinion.

COMMON CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE HIGHEST DEGREE OF CARE, vigilance, and skill, and are liable for the slightest negligence: *Gillesewee v. Madison & I. R. R. Co.*, 61 Am. Dec. 101, note 109, where other cases are collected; *Chicago & M. R. R. Co. v. Patchin*, Id. 65; *Keokuk N. L. P. Co. v. True*, 88 Ill. 614, citing the principal case.

CONTRIBUTORY NEGLIGENCE ON PLAINTIFF'S PART DEFRATS HIS RIGHT TO RECOVER: See *Murch v. Concord R. R. Corp.*, 61 Am. Dec. 631, note 642, where other cases are collected; *Chicago & M. R. R. Co. v. Patchin*, Id. 65; *Damont v. New Orleans & C. R. R. Co.*, Id. 214, note 217; *Galena & C. U. R. R. Co. v. Jacobs*, 20 Ill. 489; *Chicago, B. & Q. R. R. Co. v. Hazard*, 26 Id. 386; *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 282, all citing the principal case.

CARRIERS OF PASSENGERS BY RAILROAD ARE NOT INSURERS of the lives and limbs of their passengers: See *Peters v. Rylands*, 59 Am. Dec. 746; note to *Ingalls v. Bills*, 43 Id. 355; *Railroad Co. v. Holloren*, 53 Tex. 53, citing the principal case.

RECOVERY FOR INJURY WHERE BOTH PARTIES NEGLECT: See *Trow v. Vermont C. R. R. Co.*, 58 Am. Dec. 191, note 199, where a large number of cases are collected. In *Chicago & A. R. R. Co. v. Gratzner*, 46 Ill. 83, the principal case is cited to the point that a plaintiff, in order to recover damages, must show that his own negligence or misconduct did not concur in producing the injury complained of. And in *Chicago, B. & Q. R. R. Co. v. Hazard*, 26 Id. 386, it is said, citing the principal case, that the burden of proof is on the plaintiff to show that he was, at the time the injury happened, exercising ordinary care and diligence. But where the defendant has been guilty of negligence, and the plaintiff has shown all the care and skill that could be expected of men of ordinary prudence in like circumstances, the plaintiff is entitled to recover: *Cowen v. Ely*, 37 Id. 340, citing the principal case.

WHERE PARTY INJURED IS ALONE IN FAULT HE CANNOT RECOVER: *St. Louis, A. & T. H. R. R. Co. v. Manly*, 58 Ill. 306; *Chicago, B. & Q. R. R. Co. v. Van Patten*, 64 Id. 516, both citing the principal case.

PASSENGER TAKES ALL RISKS INCIDENT TO MODE OF TRAVEL and the character of the means of conveyance which he selects, and the party furnishing the conveyance is only required to adapt the proper care, vigilance, and skill to that particular means: *Chicago, B. & Q. R. R. Co. v. Hazard*, 26 Ill. 381, citing the principal case.

RAILROAD COMPANY IS NOT BOUND TO CARRY PASSENGER IN CABOOSE of a freight train, but if it does receive and undertake to carry him there, it will be bound by all the obligations of a common carrier of passengers upon a regular passenger train: *Ohio & M. R. W. Co. v. Dickinson*, 59 Ind. 322, citing the principal case.

PASSENGER RIDING IN BAGGAGE-CAR: See note to *Ingalls v. Bills*, 43 Am. Dec. 366.

IMPEACHMENT OF WITNESS BY PROOF OF CONTRADICTORY STATEMENTS made by him: See *Wright v. Hicks*, 60 Am. Dec. 687, note 698, where other cases are collected.

RYAN v. DUNLAP.

[17 ILLINOIS, 40.]

MORTGAGEES MAY DO SUCH ACTS IN RESPECT TO MORTGAGE DEBT as may usually be done in relation to money transactions, verbally or by writing, without regard to the mortgage security.

MORTGAGE IS DISCHARGED BY VERBAL OR WRITTEN DISCHARGE OF DEBT BY PAYMENT, without a release or satisfaction entered upon the mortgage itself or in the margin of the record.

PAYMENT DOES NOT IMPORT DELIVERY OF MONEY; it may be made in property or other securities.

BANK HAS POWER TO DISCHARGE DEBT AND MORTGAGE, AND TAKE ANOTHER IN PAYMENT, under an act which provides that it shall not exercise the usual banking powers, but shall "confine all its operations to winding up its affairs, collecting and securing its debts, paying the debts of the bank, selling its real and personal estate," etc.

CORPORATIONS ARE HELD TO PRESUMED OR IMPLIED AGENCIES, authority, and instruction, to those who are held out or permitted to act for them in their usual course of dealing within their charter powers, when not controlled specially by its provisions, the by-laws, or the nature and character of the contract, or the subject-matter of it.

CASHIER OF BANK MAY RELEASE DEBT AND MORTGAGE DUE BANK by virtue of his general authority and the custom and practice of the bank.

BILLS to foreclose mortgages by Dunlap and Fellows, separately, in which the surviving assignee of the Bank of Illinois was made a party defendant. The question of the priority of mortgage liens is involved. Stickney, the owner of the premises, mortgaged them to the bank in February, 1840, and afterwards made a conveyance to one Gatewood. Gatewood, in turn, mortgaged the same property to Dunlap; and later made a second mortgage, which was assigned to Fellows. In August, 1843, Gatewood executed and delivered to the bank, of which Dunlap was then president and Gatewood a director, his note for the amount then due on the Stickney mortgage; mortgaged the same lots and other property to secure the same; and received Stickney's note with an indorsement thereon signed by the bank cashier, to the effect that it had been paid; and on the same day the cashier entered satisfaction on the records of the Stickney mortgage. Previously to this, however, the bank had

executed to one Caldwell a power of attorney to release mortgages when satisfied. These various instruments were all duly recorded. The evidence of certain of the directors, and the entries in the books of the bank, tended to show that a substitution for the Stickney mortgage and its release had been ordered. In February, 1843, an act had been passed by the legislature suspending the banking powers of the bank, and declaring that the bank should go into liquidation; and in 1845 it was enacted that the effects of the bank should be vested in assignees, the survivor of which is now the plaintiff in error. The sale of the property in controversy and a division of the proceeds was decreed, without any recognition of the assignee's priority by virtue of the Stickney mortgage of 1840.

W. Thomas, for the plaintiff in error.

S. S. Marshall and R. S. Nelson, for the defendants in error.

By Court, *Scates*, C. J. The only question presented is simply one of priority of mortgage lien. But its solution involves two other questions: 1. Whether the mortgage under which plaintiff claims that priority was paid and discharged; 2. The powers of the board of directors and cashier to discharge it, in the manner shown by the record.

We are of opinion with the defendants upon all these questions, and will state some of the principles and reasons which we think support that conclusion.

The mortgage debt is the principal thing, and the mortgage a mere incident of it: *Coffing v. Taylor*, 16 Ill. 472; *Warner v. Helm*, 1 Gilm. 231; 1 Hilliard on Mortgages, c. 11, pp. 163, 164; 1 Hilliard on Real Prop., c. 33, pp. 418, 419, *Martin v. Mowlin*, 2 Burr. 969.

The mortgagee, and his agents and servants, may deal with and do such acts in respect to such debt as may be usually done in relation to money transactions, verbally or by writing, without regard to the mortgage security. A transfer of the debt by assignment, or delivery of the note, would generally carry the mortgage in equity, and payment would discharge the mortgage lien. The necessity of acting under seal in relation to such a debt depends upon the nature of the act, as affecting the mortgage security or the title to the land by assignment or release of the mortgage security. And this would be equally the case with individuals as with corporations. But so far as power and mode of action is concerned in transferring or collecting the debt or the note given for it, I know of no difference between

one secured by mortgage and one not so secured. Its transfer or payment is a mere question of fact and intention as if no mortgage existed, and the rules of law and evidence and the power of the parties the same. Its existence might assist in explaining and ascertaining their intention as evidenced by particular acts, but cannot vary or control their power or mode of dealing with or settling the debt. A formal release of this mortgage should be under seal, but such a release would not discharge the debt. On the contrary, a verbal or written discharge of the debt, by its payment in money, property, or other securities, would discharge the mortgage, and without a release or satisfaction entered upon the mortgage itself or the margin of the record, as provided by the revised statutes, page 110, section 87. The provision is made for the protection of mortgagees and others, by the recording and preservation of evidence of satisfaction of it on the same public record; and not as prescribing a rule of evidence.

What, then, may be alleged and sustained as payment? It is not a technical term importing the delivery of money. It may be made in property or other securities. It is a question of fact, of the meaning and intention of the parties. The proofs here leave no question of the intention. It was Stickney, not Gatewood, who owed and was bound to the bank for this debt. Gatewood, it is true, had purchased subject to the bank lien, but he owed the bank nothing on it; he was bound to Stickney, not the bank. Stickney desired to be released by payment of his debt to the bank. The bank proposed to release Stickney if Gatewood would give his note for the debt and interest due from Stickney, with a mortgage on the same and other property. This was agreed to and done, and Stickney's notes and mortgage received and delivered up to him, and satisfaction entered on the margin of its record in the recorder's office by the cashier of the bank.

The entries in the books of the bank and two of its directors prove the intention to comport with these acts, as a total discharge of Stickney's debt, without any reservation of the mortgage security to meet Gatewood's new liability secured by his mortgage of the same and other property.

It would require an express agreement to rebut such clear proof of payment. The doctrine of the mere renewal of mortgage notes by the mortgagor or others, continuing under the mortgage security, is no answer to such facts as these.

I need not review the various cases of payment by giving

higher or other securities by the debtor, or the bills or notes of third persons. A satisfactory summary will be found in 2 Greenl. Ev., secs. 516-523, and well sustained by the references: *Wiseman v. Lyman*, 7 Mass. 286; *Isley v. Jewett*, 2 Met. 168; *Allard v. Lane*, 18 Me. 9; *Fowler v. Bush*, 21 Pick. 230; *Clark v. Pinney*, 6 Cow. 301; *Hadlock v. Bulfinch*, 31 Me. 246; *New York State Bank v. Fletcher*, 5 Wend. 85; *Hilliard on Mortgages*, 306, 307, and notes 310, par. 12; *Arnold v. Camp*, 12 Johns. 409; *Barnes v. Camack*, 1 Barb. 892. There is no proof of bad faith or false representations. If there was any mistake in canceling a prior and taking a junior lien to other incumbrances, it was the fault and carelessness of the bank in not examining the records and title. They shall not be heard to allege this to the prejudice of Stickney and Gatewood.

The remaining question is as to the powers of the bank or agents and officers of the bank to make this agreement and cancellation of one debt and mortgage and take another in payment. It is needless to discuss the general doctrine which confines corporations strictly within the delegated powers, and to the objects and means within the charter.

The general powers of the bank for further transactions of general banking were suspended by the act of the twenty-fifth of February, 1843, which declared that the bank should go into liquidation within thirty days from that date: Acts 1843, p. 32, sec. 6. The seventh section declares that the bank should not exercise the usual banking powers, but should "confine all its operations to winding up its affairs, collecting and securing its debts, paying the debts of the bank, selling its real and personal estate, issuing the certificates for balances provided for in the sixth section of this act, and to renewing the notes of its debtors from time to time, upon the payment of one-fifth part each time, and to suing and being sued in relation to all its dealings," for which purpose alone its powers and charter were continued for a limited time. There were other specific directions and details for the same object.

This act seems to be now construed as converting the directors and officers of the bank into trustees of creditors and stockholders. I do not so regard it. They were no more of that character after this act, in the exercise of the powers limited by it, than before, in the full exercise of their charter powers. They were still in the management of their own affairs for the purposes of settling their business. What they had power left to do was done in the same character, though for a single object,

as the like acts before the restriction. The character of those who managed the settlement of the affairs of the bank was changed fully by the act of 1845, when assignees were appointed in the nature of receivers of the effects of the bank.

It is true, it appears by the evidence that a loan of money was a part of this particular transaction for change of debtors and securities, and which they had no power to make. But they had power to make the arrangement to secure the debt by taking the note and mortgage of one for the debt, note, and mortgage of another. And in doing so, to exercise their own best judgment of their interest. Circumstances and facts, known and apparent to them, dictated the policy and prudence of this arrangement. They acted very negligently in not examining the title, it is true; but there is no proof of fraud, design, or over-reaching in any one concerned, nor of any bad faith in Dunlap, who, though president, was not personally concerned as such, or present, or knowing of this transaction when made. The principles and doctrines contended for would render banking and other corporate acts of like general business transactions wholly impracticable. Nor do we recognize the current of authorities at this day as sanctioning the ancient strictness which required corporations to act in most important transactions by seal and in writing. In the varied and multiplied transactions of banking, manufacturing, railroad, municipal, and other corporations, it will be found impossible to provide their agents with written or even express verbal powers and instructions for all their acts on behalf of their principals, or for those dealing with them, to wait to inspect such evidences of authority.

To a very great extent, like individuals who act through agents and servants, these corporations are held to presumed or implied agencies, authority, and instruction, to those who are held out or permitted to act for them in their usual course of dealing within their charter powers, when not controlled specially by its provisions, the by-laws, or the nature and character of the contract or the subject-matter of it: *Angell & Ames on Corp.* 268-304; *Paley on Agency*, pp. 310-312, sec. 2; *Story on Agency*, secs. 52-56, and notes.

Although the English rule has not been relaxed to the same degree in this respect as the American, yet the courts have conformed to the wants and necessities of daily business transactions in a very great degree: *Beverley v. Lincoln Gas Light and Coke Co.*, 6 Ad. & El. 829; *Church v. Imperial Gas Light and Coke Co.*, Id. 846; *Mayor etc. of Ludlow v. Charlton*, 6 Mee. & W. 815.

The cashier is necessarily the general agent of the bank in dealings with customers in money, notes, and bills—the receipt, deposit, transfer, and payments of them. It is indispensable to the interests of the corporation, and necessary to the protection and security of customers, that he should exercise these powers, and that his acts should bind his employees: *Angell & Ames on Corp.* 293, 297; *Story on Agency*, secs. 92-97, 114, 115.

The cashier acted, in this instance, within the general scope of his authority in indorsing receipts for payment upon the note, mortgage, and record, as evidence of the agreement and discharge between the directors and Stickney, and in delivering them up as paid. Proof is made that he had been in the habit of entering satisfaction of mortgages in the mortgage record for four years previous. The power of attorney to Caldwell to do the same is no revocation of this authority in the cashier.

We do not think the objection sustainable, that the transaction is not proved by minutes of the proceedings of the board. The agreement may be shown by parol when no minute was made or kept; and that, although no formal meeting of the directory was had for the purpose. The transaction was known to them; they acquiesced in and acted upon it.

We are of opinion the mortgage and notes of Stickney to the bank were paid and discharged; and the assignee is not entitled to revive the mortgage as a prior lien.

Decree is affirmed.

Decree affirmed.

PAYMENT OR RELEASE OF MORTGAGE DEBT DISCHARGES OR EXTINGUISHES MORTGAGE: *Vose v. Handy*, 11 Am. Dec. 101; *Jackson v. Stackhouse*, 13 Id. 514; *Breckenridge's Heirs v. Ormeby*, 19 Id. 71; *Smith v. Durell*, 41 Id. 732; *Wolfe v. Doe ex dem. Dowell*, 51 Id. 147; *Mead v. York*, 57 Id. 467, and note; and see *Smith v. Stanley*, 58 Id. 771.

RELEASE OF MORTGAGE DEBT NEED NOT BE UNDER SEAL: *Lucas v. Harris*, 20 Ill. 169; *Vaneant v. Allmon*, 23 Id. 33; *White v. Walker*, 31 Id. 434; *Illinois Central R. R. v. Read*, 37 Id. 48; all citing the principal case to this point.

PAYMENT MAY BE MADE IN PROPERTY OR SECURITIES: *Ralston v. Wood*, 58 Am. Dec. 604, and note; see also *Mansville v. Gay*, 60 Id. 379; but see *Crutchfield v. Robins*, 42 Id. 417, and note, as to when payment can only be made in money.

CORPORATIONS, WHEN BOUND BY ACTS OF AGENTS UNDER IMPLIED AUTHORITY: *Melledge v. Boston Iron Co.*, 51 Am. Dec. 59, and prior cases in note; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.*, 53 Id. 742. The ordinary affairs of a corporation, such as custom or necessity has imposed upon the president, may be performed by him without special or express authority: *Chicago etc. R. R. v. Coleman*, 18 Ill. 299; and where an instrument,

undertaking for the delivery of personal property on the order of a corporation, was assigned by its president, in the absence of proof to the contrary it must be presumed that the president had authority to make the transfer: *Moser v. Kreigh*, 49 Id. 86; the principal case being cited to these points.

CASHIER'S POWERS, GENERALLY: See *Leggett v. N. J. Mfg. etc. Co.*, 23 Am. Dec. 728, and note; *Everett v. United States*, 30 Id. 584; *Farrar v. Gilman*, 36 Id. 786; *Elliot v. Abbot*, 37 Id. 227; *Merchants' Bank v. Marine Bank*, 43 Id. 300; *Merchants' Bank v. Central Bank*, 44 Id. 665; *State v. Commercial Bank*, 45 Id. 280; *Merchants' Bank v. Rawls*, 50 Id. 394.

THE PRINCIPAL CASE WAS ALSO CITED in *Moore v. Titman*, 35 Ill. 314, to the point that at the hearing of a suit in equity for the foreclosure of a mortgage, if the sum due thereon is not admitted, the note or other written evidence of the debt secured should be produced, or its non-production accounted for; and in *Bartlett v. Board of Education*, 59 Id. 369, as holding that parol evidence was admissible to prove a vote of the directors of a bank to accept one security in place of another, where no record had been made of the vote; and it was consequently held in the case at bar that the approval of an official bond to a board of education might be shown by parol.

SMITH v. McCONNELL.

[17 ILLINOIS, 125.]

BILL TO QUIET TITLE IS NOT MAINTAINABLE BY HOLDER OF LEGAL TITLE OUT OF POSSESSION, as a general rule; although the reason of this doctrine would not embrace mere equitable titles which could not be asserted at law.

POSTHUMOUS CHILD TAKES BY DESCENT, at all events under the Illinois statute of wills, the same as if he had been born during the life-time of the intestate.

HEIR IS OWNER OF LANDS OF INTESTATE in Illinois, and is entitled to the rents and profits thereof, although they are subject to the payment of debts, and may be divested by decree and sale of the administrator.

ADMINISTRATOR TAKES NO ESTATE, TITLE, OR INTEREST IN INTESTATE'S REALTY, in Illinois, but simply a power.

ADMINISTRATOR CANNOT BRING POSSESSORY OR REAL ACTION, at law or in equity, in Illinois, for the recovery or maintenance of possession or title, or to clear up and vindicate title from clouds from adverse claims.

BILL by David A. Smith, administrator of the estate of Jerome McKee, sen., and Jerome McKee, jun., a posthumous son of the latter, to quiet title to certain real estate. It appears from the pleadings and proofs that the defendants McConnell and Vansyckel, who asserted a claim against the estate of one Jesse McKee, father of Jerome McKee, sen., had previously to the filing of the present bill filed a bill in equity against the executor of Jesse McKee and the heirs of Jerome McKee, sen., who was devisee under his father's will, and who had died intestate, and a decree by default for the sale of the real estate in question

was obtained. The lands were sold to McConnell and one Abbott, and the sale was confirmed, and the purchasers ordered to have immediate possession. McConnell afterwards conveyed a portion to the defendant Lee. Jerome McKee, jun., was not made a party to the suit by McConnell and Vansyckal, and alleges that the claim of the latter against the estate of Jesse McKee was groundless and unjust. The bill was dismissed absolutely as to Smith, but without prejudice to McKee.

D. A. Smith, for the appellants.

M. McConnell, for the appellees.

By Court, SCATES, C. J. The decree should be affirmed. The court have, in *Alton Marine and Fire Insurance Co. v. Buckmaster*, 13 Ill. 205, sanctioned the doctrine laid down in *Trustees of Louisville v. Gray*, 1 Litt. 147, and *Harris v. Smith*, 2 Dana, 10, that "the holder of a legal title not in actual possession cannot, as a general rule, maintain a bill to quiet his title, and to compel a relinquishment of adverse claims." *Niven v. Belknap*, 2 Johns. 573. "The reason why the party out of possession cannot maintain such a bill is, that he may bring an action at law to test his title, which, ordinarily, a party in possession cannot do; such a bill is only entertained by a court of equity because the party is not in a position to force the holder of, or one claiming to defend under, the adverse title into a court of law to contest its validity; and this, as a general rule, is the test to which a court of equity will look to determine whether the necessity of the case requires its interference:" *Alton Marine and Fire Insurance Co. v. Buckmaster*, 13 Ill. 205. And the question in *Harris v. Smith*, 2 Dana, 10, was regarded as one of jurisdiction.

But the reason of the rule as thus laid down is applicable to legal titles in persons out of possession, and would not embrace mere equitable titles which could not be asserted at law. Though bills may be brought sometimes before establishing complainant's rights at law, they are entertained with great caution, even on behalf of persons in possession, when there is no such disturbance of the right of possession as will enable the party to maintain his action at law: *Trustees of Louisville v. Gray*, 1 Litt. 147; see *Mayor of York v. Pilkington*, 1 Atk. 284; *Lord Tenham v. Herbert*, 2 Id. 484; *Bush v. Western*, Prec. Ch. 531.

This case presents no such grounds. The heir is out of possession and the defendants in, and the courts of law are not only open, but competent to try his title, which is a legal one. Upon

a recovery by him at law under our statute for bringing ejectments, under which the real title may be put in issue and determined, no apparent ground of equitable jurisdiction or interference would remain, not even in the shape of a cloud upon the title.

The question involved seems to be one of a simple, naked succession by descent being cut off by a decree and sale in a proceeding in equity against those alone who would have been heirs of the same intestate, had not this posthumous child been born, in due time, together with the executor of the testator, from whom the intestate took by devise.

Our statute of wills, R. S. 1845, p. 547, sec. 54, has expressly provided for such a case, and that they shall take "in all respects as though he, she, or they had been born in the life-time of the intestate." An analogous statute, 10 & 11 Wm. III., c. 16, was passed in England, providing that posthumous children should take estates limited in remainder, under marriage or other settlements.

In *Reeve v. Long*, 1 Salk. 227, the house of lords, reversing the judgment of the court of king's bench, held that a posthumous child could take a contingent remainder limited under an executory devise in a will. This case was before the statute of William III., and tradition gives us a reason for omitting such devises in the statute, that the lords were unwilling to throw thereby a doubt upon the correctness of their own decision, with which the judges were much dissatisfied, and blamed the judge who tried the cause for suffering a special verdict to be found: Butler's note to Co. Lit. 298.

It is said there is no ground for a distinction under the statute between executory devises and marriage and other settlements: Bull. N. P. 105; and in *Roe v. Quarley*, 1 T. R. 634, it seems to have been taken for granted that executory devises were within the statute. This case, among others, was cited and approved in *Thellusson v. Woodford*, 11 Ves. 140, and the courts sustained an executory devise dependent upon nine lives in being, and the survivor of them. And although it was the manifest intention of the testator to prevent the alienation of the property as long as he could and provide for an accumulation of rents and profits during the same period, yet as much as the law abhors perpetuities—and judges set their faces against them—it was held that the period of gestation might be counted as a life, in being both at the beginning and at the end of the nine lives, thus doubling the period of gestation, and treating each child

en ventre sa mère at the beginning and at the end of the lives upon which the executory limitation depended for vesting, as a life in being, sufficient to sustain it. Many decisions are reviewed in it, and all of which fully sustain the position that such a posthumous child is not only capable of taking himself, but is such a life in being as will support a contingent remainder under an executory devise by will and a contingent remainder limited by marriage or other settlements: See *Love v. Wyndham*, 1 Mod. 50; *Scatterwood v. Edge*, 1 Salk. 229; *Humberton v. Humberton*, 1 P. Wms. 332; *Sheffield v. Lord Orrery*, 3 Atk. 282; *Goodtitle ex dem. Gurnall v. Wood*, Willes, 211; *Robinson v. Hardcastle*, 2 Bro. C. C. 30; *Luddington v. Kime*, 1 Ld. Raym. 207; *Northey v. Strange*, 1 P. Wms. 340; *Burdet v. Hopegood*, Id. 486; *Beale v. Beale*, Id. 244; *Wallis v. Hodson*, 2 Atk. 117; *Basset v. Basset*, 3 Id. 203; *Gulliver v. Wickett*, 1 Wils. 105; *Doe ex dem. Lancashire v. Lancashire*, 5 T. R. 49; *Doe ex dem. Clarke v. Clarke*, 2 H. Black. 399; *Long v. Blackall*, 3 Ves. jun. 486; S. C., 7 T. R. 100; *Harrison v. Harrison*, stated from register book for 4 Ves. 338.

It is said in *Thellusson v. Woodford*, 11 Ves. 140, by Baron Macdonald, *arguendo*, that the rule is otherwise in case of descent, and which is strongly implied by our statute as amendatory of the common law; yet, whether we could or not derive the rule from the common law, which held it criminal to destroy such a life, we have it expressly given by statute, and the minor plaintiff falls clearly within it. The same rule was sustained, as to devises, in New York without a statute: *Stedfast v. Nicoll*, 3 Johns. Cas. 18. The American law is so summed up by Mr. Hilliard, both by descent and limitations: 1 Hilliard on Real Prop., c. 45, p. 521; see 4 Kent's Com. 248.

It has been held repeatedly by this court that the lands of one dying intestate descend to the heir; and although it is subject to the payment of debts, and may afterwards be divested by decree and sale of the administrator, the heir is nevertheless owner, and entitled to the rents and profits in the mean time. The administrator, therefore, takes neither an estate, title, nor interest in the realty; not even so much as to make judgments for debts against the estate absolutely binding by privity, as against the heir and the land, on an application to sell to pay the debts: *Stone v. Wood*, 16 Ill. 177. The administrator, therefore, takes a power, and not an interest. No argument supported by analogy to settled principles, and no authority or decision was shown, which would enable an administrator to

support any possessory or real action, in law or equity, for the recovery or maintenance of possession or title, or to clear up and vindicate title from clouds from adverse claims.

A very forcible argument was offered to show how beneficial it might be to so change the law as to allow administrators to do so, for the purpose of preventing sacrifices by selling under such circumstances of suspicion upon the title, since they have power to dispose of the whole fee. The object is a worthy and meritorious one, well calculated to promote the interests of both creditors and heirs. And had the heir filed his bill to enjoin a sale by the administrator at a sacrifice until he could remove such depreciating influence with a *bona fide* offer, with convenient speed to do so, a much stronger ground for equitable interposition would have been presented. The law does not afford redress, literally, as broad as its theory and maxims. Every possible damnification is not a legal injury. So it was held in *Burnap v. Dennis*, 3 Scam. 478, that where a public sale of personality by an administrator was prevented by threats to prosecute and litigate with any person who should purchase, no action was maintainable. The doctrine of slander of title does not embrace personality, and administrators cannot maintain such action in respect of the reality. I am of opinion that an administrator's rights and powers in this respect are no broader than his duties, and they are limited to the sale of the title and estate of the intestate and the due administration of the proceeds.

Decree affirmed.

SKINNER, J., concurred.

BILLS TO QUIET TITLE, WHEN MAINTAINABLE: See 3 Pomeroy's Eq. Jur., sec. 1396; bills of peace: *Woodward v. Seely*, 50 Am. Dec. 445, and note, where the subject is discussed; *Lyerly v. Wheeler*, 59 Id. 596; bills to remove clouds from title: *Johnson v. Cooper*, 24 Id. 502, and note; *Lyon v. Hunt*, 46 Id. 218; *Banks v. Evans*, 48 Id. 734; *Downing v. Wherrin*, 49 Id. 139. The reason why a party out of possession, having the legal title, cannot maintain a bill to quiet title, is that he may bring an action at law to test his title, which, ordinarily, a party in possession cannot do: *Comstock v. Henneberry*, 66 Ill. 214, citing the principal case to this point.

POSTHUMOUS CHILD TAKES BY DESCENT: *Harper v. Archer*, 43 Am. Dec. 472, and note considering the question; *Nelson v. Iverson*, 60 Id. 442.

HEIRE'S INTEREST AND RIGHTS IN LAND BEFORE ADMINISTRATION: See *Hyde v. Barney*, 44 Am. Dec. 335; *Douglass's Lessee v. Massie*, 47 Id. 375; *Worthy v. Johnson*, 52 Id. 399; *Easterling v. Blythe*, 56 Id. 45; *Fisk v. Norvel*, 58 Id. 128; *Buford v. Holliman*, 60 Id. 223, and notes to these cases.

ADMINISTRATOR'S OR EXECUTOR'S RIGHT TO BRING POSSESSORY OR REAL ACTION: See *Hubbard v. Ricart*, 23 Am. Dec. 198, and note; *Ruffner v.*

Lewis's Ex'r's, 30 Id. 513; *Leakey v. Gardner*, 28 Id. 764; *McFarland v. Stone*, 44 Id. 325. An administrator in Illinois cannot maintain a bill to remove an incumbrance or cloud from title to lands of the intestate: *Ryan v. Duncan*, 38 Ill. 148; *LeMoyns v. Quimby*, 70 Id. 403; *Gridley v. Watson*, 53 Id. 190; *Shoemate v. Lockridge*, Id. 507; *Phelps v. Funkhouser*, 39 Id. 405, 406; *Bennett v. Whitman*, 22 Id. 454; see also *McConnel v. Smith*, 27 Id. 234; nor has he any power to support any possessory or real action for the recovery or maintenance of possession or title: *Bennett v. Whitman, supra*; his rights and powers are no broader than his duties, and they are limited to the sale of the title and estate of the deceased, and the due administration of the proceeds: *Id.*; he has no interest in the realty; he must take the estate as he finds it, and if encumbered, his duty is to sell it, subject to the incumbrance, or not at all: *Sebastain v. Johnson*, 72 Ill. 283; *LeMoyns v. Quimby, supra*. The principal case is cited to the foregoing points.

BROWNING v. CITY OF SPRINGFIELD.

[17 ILLINOIS, 148.]

MUNICIPAL CORPORATION IS LIABLE FOR NEGLIGENCE IN NOT REPAIRING STREETS, where a specific duty to repair is imposed and adequate powers and means to discharge the duty are provided.

ACTION for damages. The plaintiff alleged that it was the duty of the defendant to keep a certain street in repair, which duty had been neglected, and in consequence thereof the plaintiff had fallen and broken his leg. A demurrer was sustained by consent.

Lincoln and Herndon, for the plaintiff in error.

Stuart and Edwards, and W. J. Black, for the defendant in error.

By Court, SCATES, C. J. The case is one for negligence in not repairing the streets; and may be distinguishable from a case for carelessness, negligence, or unskillfulness in the manner of doing work or making repairs. Parties might be liable civilly for private damage for the latter who were not so liable for the former. Corporations, like individuals, are liable for negligent, unskillful acts of their servants and agents in the performance of their work in such manner as to injure the property of others. *Sic utere tuo non alienas ladas* is applicable to all, and should afford practical redress against a certain class of injuries to others, arising from the manner in which we enjoy and exercise our rights over our own property. It is broadly laid down and applied in *Mayor etc. of New York v. Bailey*, 2 Denio, 439 for the unskillful and insufficient manner of building the dam on Croton river for the water-works of the city, though the city had a discretion whether the dam should be built. *McCombs v. Town*

Council of Akron, 15 Ohio, 474, held a still broader rule, and fixed the liability for an injury to a house from grading a street, where there was neither negligence nor malice.

The case of *Russell v. Men of Devon*, 2 T. R. 671, has settled that the inhabitants of a county are not liable to a civil action for injuries occasioned by want of repairs of a bridge; although the county was required to make the repairs. And it was put upon the footing that the common law afforded no remedy in such a case.

This has since been extended by decisions in this country to counties, overseers of highways, commissioners of highways, and towns; and in the case of *Russell v. Men of Devon* has been invariably referred to to show there was no civil remedy at the common law: *Mower v. Inhabitants of Leicester*, 9 Mass. 250 [6 Am. Dec. 63]; *Riddle v. Proprietors of Locks and Canals on Merrimack River*, 7 Id. 169 [5 Am. Dec. 35]; *Farnum v. Town of Concord*, 2 N. H. 392; *Hedges v. County of Madison*, 1 Gilm. 568; *Barilett v. Crosier*, 17 Johns. 449 [8 Am. Dec. 428]; *Morey v. Town of Newfane*, 8 Barb. 646.

These decisions are doubtless all correct, but the reason upon which they are founded is not to be found in case of *Russell v. Men of Devon, supra*. As a general rule, at the common law the counties were charged with the duty of repairing highways and bridges, unless other parishes, boroughs, or corporate bodies were liable by prescription or statute: *People ex rel. Hoes v. Canal Trustees*, 14 Ill. 402. But this liability with us is one of imperfect obligation, because the duty is not absolute, nor the means of performing it unlimited. The county, to a great extent, exercises a discretion in building and repairing bridges, and in opening and discontinuing highways: Id. Besides a want of perfect and full powers in counties, supervisors, and other public officers charged with these duties, adequate to raise the necessary means, and a discretion to judge of the time, place, manner, and amount required, they are corporations or quasi corporations, and officers involuntarily charged with duties appertaining alone to the public, and exercise subordinate ministerial functions in the discharge of fixed and prescribed duties. They are criminally liable, for neglect by information or indictment, to fine; and to this only to the extent of the means placed under their control: *Barilett v. Crosier*, 17 Johns. 449 [8 Am. Dec. 428]; *People v. Adsit*, 2 Hill (N. Y.), 619; *People v. Commissioners of Highways of Hudson*, 7 Wend. 474; *Morey v. Town of Newfane*, 8 Barb. 646;

Barker v. Loomis, 6 Hill, 464; *Lynn v. Adams*, 2 Ind. 143. While this obligation is perfect with respect to the duty prescribed, and the liability criminally is reciprocal for its breach, yet in the sense and view of a private civil remedy by suit for damages for its neglect, its obligation is imperfect upon these mere public agents or officers whenever the power and means are wanting, and the duty is not clear, specific, and complete. I speak of non-feasance, for there might be liability for malfeasance when none would arise civilly for neglect. But this class of public agents and this class of powers and duties are not to be confounded with another, whether individual or corporate, possessing ample and full powers and means and charged with a full, specific, and complete duty. Such are liable for injuries arising from omissions of duty, and, like individuals, for a careless, negligent, and unskillful performance.

This shows the true distinction between the two classes of cases: where the duty is clear, specific, and complete, but where the means may not be adequate; and those cases where both are complete. In the former the obligation is imperfect, that is, there is no civil liability; in the latter there is a perfect obligation and a civil liability for neglect in all cases of special private damage.

A short review of cases of this latter class may clear the subject of apparent difficulty by confounding them. By immemorial usage the corporation of Lyme Regis were bound to repair a certain creek, for want of which Turner was compelled "to carry his corn round about," without alleging other special damages. Held, that the action would lie; "it might be the very condition and terms of their creation and charter:" *Mayor of Lynn v. Turner*, Cowp. 86. In *Mayor etc. of Lyme Regis v. Henley*, 1 Bing. N. C. 222; S. C., 27 Eng. Com. L. 366, in the house of lords, special damages were laid. The action was sustained upon the ground that the charter imposed the duty of repairing the buildings, banks, sea-shores, and all other mounds and ditches, the pier-quay or the cob, etc. Certain farm rents due from the corporation were remitted; liberty to dig stone, and other means of performing the duties enjoined, were conferred upon the corporation.

Parke, J., in delivering the opinion of the judges, lays down certain predicates which test the question, and when they all exist the civil action will lie: 1. It must appear that the corporation is under a legal obligation to repair the place in question; 2. That such obligation is matter of so general and public con-

cern that an indictment would lie against the corporation for non-repair; 3. That the place is out of repair; and lastly, that the plaintiff has sustained some peculiar damages beyond the rest of the subjects.

The doubt arose upon the first and second requisites. The duty to repair arose as a condition of the charter with the privileges and means conferred, and which were accepted. Upon the same principle, in *Hulson v. City of New York*, 5 Sandf. 296, the city was held liable for damages occasioned by the non-repair of a street; and in construing the one hundred and seventy-fifth section of the general act relating to the city of New York, a phraseology merely permissive was held to be peremptory in imposing the duty of repair: *Mayor etc. of New York v. Furze*, 3 Hill (N. Y.), 612.

This was applied to the negligence of persons employed by the officers of the corporation in repairing sewers, in *Lloyd v. Mayor etc. of New York*, 5 N. Y. 369 [55 Am. Dec. 347]. And again in Pennsylvania, in *Pittsburgh v. Grier*, 22 Pa. St. 63 [60 Am. Dec. 65], for allowing pig-iron to lie on the wharf contrary to their own ordinances, by means of which a steamer was lost. The city of Madison was made liable for damage done a tan-yard, etc., by the negligence or unskillfulness of agents of the city in the construction of a culvert and embankment across a certain run or brook in the public street: *Ross v. City of Madison*, 1 Ind. 281 [48 Am. Dec. 361]. *McCombe v. Town Council of Akron*, 15 Ohio, 474, is another and strong instance of liability for work done in a negligent manner.

In Massachusetts, Maine, Vermont, and New Hampshire, express provision is made by statute for a recovery of civil damages: *Farnum v. Town of Concord*, 2 N. H. 392; *Brady v. City of Lowell*, 3 Cush. 124; *Mower v. Inhabitants of Leicester*, 9 Mass. 250 [6 Am. Dec. 63]; *Cobb v. Standish*, 14 Me. 198; *Johnson v. Whitefield*, 18 Id. 286 [36 Am. Dec. 721]; *Rice v. Montpelier*, 19 Vt. 474; *Baxter v. Winooski Turnpike Co.*, 22 Id. 121 [52 Am. Dec. 84]. It is true that in this last case, and in *Mower v. Leicester*, *supra*, the courts say that no action lay at common law, but both vouch *Russell v. Men of Devon*, *supra*, which does not support that position, but only decides that the action will not lie against the inhabitants of the county. The argument of the court in that case shows that the action did not lie, and would not against the county itself, had it been a corporation capable of being sued. But the reason for it does not appear to be so much the want of a statutory provision as the existence of

facts showing the county possessed of powers and means, and expressly requiring the specific duty; as was shown against the corporation of Lyme Regis, and in the several cases against the city of New York, all of which were cases of mere neglect to repair, as was also the case of the mayor of Lyme Regis. The simple deduction which may be drawn from the cases is, that where a specific duty to repair is fully and completely enjoined, and full and adequate powers and means are provided, or put within the power of the person or corporation to provide, the obligation is perfect, and liability for neglect is reciprocal for the special damages occasioned by it. The same rule is adopted in Alabama and Florida: *Smoot v. Mayor etc. of Wetumpka*, 24 Ala. 112; *City of Tallahassee v. Fortune*, 3 Fla. 19 [52 Am. Dec. 358].

Apply these principles to the case before us. We judicially notice the public charter of the city and its provisions, and in them we find the duty imposed as a matter of public law as alleged in the declaration: Acts 1839, p. 9, art. 5, secs. 9, 10. In the same article power is given to levy a tax of one half per cent per annum on all taxable property in the city: Sec. 1; to license and tax auctioneers and other dealers: Sec. 17; hacks, carriages, etc.: Sec. 18; tippling-houses: Sec. 21; to impose fines, etc.: Sec. 34; with various other powers usually granted to cities, including that of condemning private property for public use, in opening, widening, or altering streets, lanes, avenues, and alleys: Art. 7, sec. 1; and a power to tax owners of lots for grading and paving sidewalks and lighting streets, etc.: Sec. 6.

All public property of the city is vested in the corporation, with power to cause all male inhabitants of twenty-one years to work three days on the streets: Art. 8, sec. 2. And in addition, the inhabitants are exempted from work on roads outside of the city limits, and from taxes for that purpose, and from all county tax on personalty. The city is required to support its paupers, and pay the court and jail expenses of those committing crime within the city.

Here is a specific, full, and complete duty imposed, with powers adequate to discharge it, and means that appear ample to its accomplishment in labor, taxes, fines, etc. An indictment would surely lie for neglect. The non-repair is fully averred; so also are the injury and damage.

Under the strictest rules laid down in this class of cases, this seems clearly to fall within them, and fix the liability of defendant for the injury occasioned by its neglect.

Nor do I perceive that this is in any degree in conflict with

the principles and cases which are put upon the principles of the common law in its application to public corporations, and public officers solely charged with the execution of part of the details of the law in relation to highways and bridges. Here valuable privileges are granted, with ample resources of labor, taxes, and fines, with powers to enforce the labor and payments, and exemptions granted from other onerous burdens.

All these considered together exceed the apparent powers and means given to the corporation of Lyme Regis, and I can see no apparent reason for a greater limitation of its liability than was fixed in that case under like circumstances. The duty is also as clear, the power as ample, and the means as ample, apparently, as in the cases against the city of New York. Why the redress and remedies should not be as ample and extensive, both public and private, for the protection of citizens and others against the negligence of this city as those other cities mentioned, I am unable to discover.

With such lights for our guide, and such authorities for our sanction, we not only feel authorized but required to afford the protection sought, and more especially as we think the decisions based upon sound sense in accordance with strict morality, and keeping pace with the progress of the improvements of the age.

Judgment reversed and cause remanded, with leave to defendant to plead.

Judgment reversed.

LIABILITY OF CITIES FOR NEGLECT TO REPAIR STREETS.—In the consideration of this question, it is necessary at the outset to observe the distinction made as to liability between cities proper and towns and other *quasi* corporations; for with respect to the latter, the decisions are almost uniform to the effect that they are not liable to private actions for injuries caused by their neglect to repair streets or highways, unless such action is expressly given by statute: Note to *Riddle v. Proprietors*, 5 Am. Dec. 43; *Mower v. Inhabitants of Leicester*, 6 Id. 63; *Bartlett v. Crosier*, 8 Id. 428, and note; *Farnum v. Town of Concord*, 2 N. H. 392; *Eastman v. Meredith*, 36 Id. 284; *Commissioners of Highways v. Martin*, 4 Mich. 557; *Chidey v. Town of Canton*, 17 Conn. 476; see, further, *Bancroft v. Inhabitants of Lynnfield*, 29 Am. Dec. 623; *Dutton v. Weare*, 43 Id. 590; *Jones v. Inhabitants of Waltham*, 59 Id. 783; *Troy v. Cheshire R. R.*, 55 Id. 177; *Lund v. Tyngborough*, 59 Id. 159; *Kimball v. City of Bath*, 61 Id. 243. The principal case has been cited in *Town of Waltham v. Kemper*, 55 Ill. 349-351, S. C., 8 Am. Rep. 653, 655, as giving the reasons for this distinction. Of course, where it is expressly provided by statutes or in charters that cities shall be liable to individuals for injuries resulting from neglect to repair streets, the question is, simply, For what injuries are they liable? And with this question we have nothing to do in the present note. The same rules apply to cities, in this regard,

when thus made liable, as to towns, villages, etc., against which it is expressly provided that private actions may be maintained. In the New England states the statutes which impose the liability upon towns apply equally to cities. Thus in *Raymond v. City of Lowell*, 6 Cush. 524, S. C., 53 Am. Dec. 57, Fletcher, J., says: "The liability of towns to keep roads in repair is created by statute, the provisions of which apply equally to the country and to cities." But the courts of New England do not recognize any implied liability resting upon either cities or towns for injuries resulting from neglect to repair streets or sidewalks: 2 Dillon on Mun. Corp., sec. 1000. "A city, like a town," says Gray, C. J., "is not liable for a defect in a highway, except so far as the right to maintain such an action has been clearly given by statute:" *Hill v. City of Boston*, 122 Mass. 344; S. C., 23 Am. Rep. 332; citing *Brady v. City of Lowell*, 3 Cush. 121; *Harwood v. City of Lowell*, 4 Id. 310; *Hixon v. City of Lowell*, 13 Gray, 59; *Oliver v. City of Worcester*, 102 Mass. 489; S. C., 3 Am. Rep. 485. So it is held in Connecticut that the acceptance of a special charter by a municipal corporation, authorizing it to perform a strictly governmental duty, does not create a contract between the corporation and the state that it shall be performed, nor make the corporation liable for an omission to perform, or a negligent performance of it: *Hesserson v. City of New Haven*, 37 Conn. 475; S. C., 9 Am. Rep. 342. The general principle was laid down in the case of *Hill v. City of Boston*, *supra*, that no private action, unless expressly authorized by statute, could be maintained against a city for the neglect of a public duty imposed by law for the benefit of the public, and from the performance of which the city derives no advantage. It was held, therefore, that a child, attending a public school in a school-house provided by a city under the duty imposed upon it by general laws, could not maintain an action against the city for an injury suffered by reason of the unsafe condition of a staircase in the school-house; citing the principal case, p. 385, to the point that in Illinois incorporated cities are held liable to actions for neglect of duties imposed by their charters to repair highways and bridges. The rule here asserted was approved in *French v. City of Boston*, 129 Mass. 592, S. C., 37 Am. Rep. 393, in which it was held that a city, bound by statute to maintain a draw-bridge as part of a public highway, was not liable to the owner of a vessel for detention caused by the draw being narrower than the law prescribes, nor for the action of the superintendent of the bridge, resulting in delaying the vessel, in the absence of an express statutory liability, although by statute the city was liable to a traveler thereon for any defect in the highway of which the bridge was a part. A similar view is taken by the courts of a few other states. Thus in a recent case in South Carolina, it is held that no distinction as to liability for neglect to repair streets and highways exists between municipal corporations and quasi corporations, and neither was liable to a civil action therefor unless the liability was imposed by statute: *Young v. City Council of Charleston*, 29 S. C. 116; S. C., 47 Am. Rep. 827; and see *Black v. City of Columbia*, 19 S. C. 412; S. C., 45 Am. Rep. 785; 16 Rep. 798. So in New Jersey the duty of a city in respect to the repair of streets is a public one, and the neglect to perform it will not give a private remedy without an express statute: *Pray v. Mayor etc. of Jersey City*, 32 N. J. L. 394; compare *Durant v. Palmer*, 29 Id. 544. In Michigan, also, it was decided that a city was not liable, independent of legislative enactment, to an injured person for neglect to keep a cross-walk in repair: *City of Detroit v. Blackaby*, 21 Mich. 84; S. C., 4 Am. Rep. 450; 9 Am. Law Reg., N. S., 670. Cooley, J., dissented, and cited the principal case as very fully and carefully considering the question; but in the

subsequent case of *McCutcheon v. Homer*, 43 Mich. 483, S. C., 38 Am. Rep. 212, the same able jurist, in delivering the opinion of the court, affirmed this prior decision. A statute of Michigan has, however, since made cities, townships, and villages liable for injuries sustained by individuals by reason of defects in streets and highways: *City of Grand Rapids v. Wyman*, 46 Mich. 516; *Burnham v. Township of Byron*, Id. 555; *Denton v. Common Council of Village of Albion*, 50 Id. 129. It was held in *City of Detroit v. Putnam*, 45 Id. 263, that this statutory enactment, being in derogation of the common law, did not extend to injuries caused by defective sidewalks, of which no mention was made in the statute.

The doctrine of these cases does not obtain in the great majority of states. According to the prevailing view, where the duty to keep streets in repair is in terms imposed upon cities, and means to perform this duty are provided, the cities are liable to civil actions by persons specially injured from a neglect to perform such specific duty, without an express statute declaring their liability to such actions; and also where the duty to repair is not specifically enjoined, and an action for damages caused by neglect to repair streets is not expressly given, still where they have the powers ordinarily conferred upon them to open, repair, improve, and the like, streets, sidewalks, and bridges within their limits, and to raise the necessary funds for that purpose, the duty results, and they are liable to civil actions for special injuries caused by neglect to repair. These propositions are established by numerous cases: *Smoot v. Mayor etc. of Wetumpka*, 24 Ala. 112; *Albritton v. Mayor etc. of Huntsville*, 60 Id. 486; *City of Selma v. Perkins*, 68 Id. 145; *Campbell's Adm'x v. City Council of Montgomery*, 53 Id. 527-529; S. C., 25 Am. Rep. 658, 657; *City of Tallahassee v. Fortune*, 3 Fla. 19; S. C., 52 Am. Dec. 358; approved: *City of Jacksonville v. Fortune*, 19 Fla. 106, 117; S. C., 45 Am. Rep. 512; *City of Bloomington v. Bay*, 42 Ill. 503, 507; *City of Joliet v. Verley*, 35 Id. 58; *City of Springfield v. Le Claire*, 49 Id. 476; *City of Decatur v. Fisher*, 53 Id. 407; *City of Peru v. French*, 55 Id. 317; *City of Centralia v. Scott*, 59 Id. 129; *City of Sterling v. Thomas*, 60 Id. 264, 266; *City of Rockford v. Hildebrand*, 61 Id. 155; *Lowrey v. City of Delphi*, 55 Ind. 250; *Higert v. City of Greencastle*, 43 Id. 574, 585; *Roswell v. Williams*, 29 Iowa, 210; *Manderschid v. City of Dubuque*, 29 Id. 73; S. C., 4 Am. Rep. 196; *Jansen v. City of Atchison*, 16 Kan. 358; *City of Topeka v. Tuttle*, 5 Id. 311; *City of Atchison v. King*, 9 Id. 550; *Smith v. City of Leavenworth*, 15 Id. 81, 86; *Mayor etc. of Baltimore v. Marriott*, 9 Md. 160, 174; *Mayor etc. of Baltimore v. Pendleton*, 15 Id. 12; *Sharle v. City of Minneapolis*, 17 Minn. 308; *Moore v. City of Minneapolis*, 19 Id. 300; *Cleveland v. City of St. Paul*, 18 Id. 278, 286; *Furnell v. City of St. Paul*, 20 Id. 117; *O'Leary v. City of Mankato*, 21 Id. 65, 68; *Delger v. City of St. Paul*, 14 Fed. Rep. 567 (U. S. Cir. Ct., Dist. Minn.); *Blake v. City of St. Louis*, 40 Mo. 569; *Smith v. City of St. Joseph*, 45 Id. 449; *Oliver v. City of Kansas*, 69 Id. 79; *City of Omaha v. Olmstead*, 5 Neb. 446, 452; *Mayor etc. of New York v. Furze*, 3 Hill (N. Y.), 612; *Hulson v. Mayor etc. of New York*, 5 Sandf. 289; S. C. on appeal, 9 N. Y. 163; 59 Am. Dec. 526, and note; *Lloyd v. Mayor etc. of New York*, 5 N. Y. 369; S. C., 55 Am. Dec. 347 (sewer); *Wilson v. Mayor etc. of New York*, 1 Denio, 595; S. C., 43 Am. Dec. 719 (sewer); *Conrad v. Trustees of Ithica*, 16 N. Y. 158; *Weet v. Village of Brockport*, Id. 161; *Barton v. City of Syracuse*, 36 Id. 54 (sewer); *McCarthy v. City of Syracuse*, 46 Id. 194; *Diveny v. City of Elmira*, 51 Id. 506; *Clemence v. City of Auburn*, 66 Id. 334, 341; *Davenport v. Ruckman*, 37 Id. 568, 572; *City of Dayton v. Peace*, 4 Ohio St. 80; *Weightman v. City of Washington*, 1 Black, 39; *Nebraska City v. Camp-*

bell, 2 Id. 590; *City of Chicago v. Robbins*, Id. 418; *Barns v. District of Columbia*, 91 U. S. 540, 551. The principal case has always been regarded as a leading one, and is cited to the above points in *City of Bloomington v. Bay*, 42 Ill. 507; *City of Springfield v. Le Claire*, 49 Id. 479; *City of Decatur v. Fisher*, 53 Id. 408; *City of Chicago v. Fowler*, 60 Id. 323; *City of Rockford v. Hildebrand*, 61 Id. 161; *Soper v. Henry Co.*, 26 Iowa, 268; *McCullom v. Black Hawk Co.*, 2¹ Id. 414; *City of Omaha v. Olmstead*, 5 Neb. 452; *Weightman v. City of Washington*, 1 Black, 53; *Water Company v. Ware*, 16 Wall. 574; *City of Detroit v. Blacheby*, 21 Mich. 122; S. C., 4 Am. Rep. 464, per Cooley, J., dissenting; and see *Hill v. City of Boston*, 122 Mass. 365; S. C., 23 Am. Rep. 365. In Pennsylvania, the duty of cities, boroughs, townships, and counties to repair is statutory, and for neglect in this respect they are liable to private actions for special injuries: *Dean v. New Milford Township*, 5 Watts & § 545; *Commissioners of Kensington*, 10 Pa. St. 93; S. C., 49 Am. Dec. 582; *Erie v. Schwingle*, 22 Pa. St. 384; S. C., 60 Am. Dec. 87; *Humphreys v. County of Armstrong*, 56 Pa. St. 204; *Rapho v. Moore*, 68 Id. 404; *McLaughlin v. City of Corey*, 77 Id. 109; *Township of Newlin v. Davis*, Id. 317; *Fritsch v. City of Allegheny*, 91 Id. 226, 227; see also *Pittsburgh v. Grier*, 22 Id. 54; S. C., 60 Am. Dec. 65.

Judge Dillon, in his work on municipal corporations, thus sums up the result of these authorities, section 1017: "It may be fairly deduced from the many cases upon this subject that in the absence of an express statute imposing the duty and declaring the liability, municipal corporations proper, having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty. Such duty and liability are considered to exist, without a positive statute, when the following conditions concur: 1. The place in question, whether bridge, sidewalk, or street, must be one which it is the duty of the corporation to repair or keep in a safe condition; and this duty (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation; 2. This duty or burden must appear, upon a fair view of the charter or statutes, to be imposed or to rest upon the municipal corporation, as such, and not upon it as any agency of the state, or upon its officers as independent public officers (this, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways); 3. The power to perform the duty of maintaining the streets in a safe condition, by authority to levy taxes or impose local assessments for the purpose, must be (as it most always is) conferred upon the corporation." Again he says, section 1018: "Where the duty to keep streets in repair is, in terms, enjoined upon the corporate authorities, and they are supplied with the means to perform it, there is little difficulty, we think, in holding the corporation liable, on the general principle of the law, without an express statute declaring the liability to a civil action by one specifically injured by its neglect to discharge this specific duty. But where the duty to repair is not specifically enjoined, and an action for damages caused by defective streets is not expressly given, still both the duty and the liability, if there be nothing in the charter or legislation of the state to negative the inference, has often, and in our judgment properly, been deduced from the intrinsic na-

ture of the special powers conferred upon the corporation to open, grade, improve, and exclusively control public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to discharge this duty."

As in the case of cities, if incorporated towns have the power to keep in repair streets, alleys, and bridges within their limits, and are provided with the necessary means to exercise this power, it is their duty to so repair, and if special injuries result to individuals by reason of a neglect of such duty, the towns must respond in damages: *Town of Centerville v. Woods*, 57 Ind. 192, 195; *President etc. of Town of Mechanicsburg v. Meredith*, 54 Ill. 84. So in New York it is held that where a village has power to repair streets and sidewalks, and prevent obstructions thereof, and has suffered a sidewalk, unsafe in construction and built without its authority, to remain for a year, it is liable for an injury occasioned thereby: *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; S. C., 46 Am. Rep. 122. And where it is provided that "every road district shall be responsible for all damages sustained by any person in consequence of defects in the roads and bridges in said district," and that a certain incorporated city shall constitute one district, such city is liable in its corporate capacity for injuries resulting from the defective condition of its streets and bridges: *Rusch v. City of Davenport*, 6 Iowa, 443. The legal obligation of a city to repair highways, streets, sidewalks, and bridges within its corporate limits, however, is one voluntarily assumed by its corporate authorities, and relates to such as were opened or constructed, or allowed to be opened or constructed, under its authority, and those which its officers assume control over for the purpose: *City of Joliet v. Verley*, 35 Ill. 58. And although canal trustees cannot, by building a bridge over a canal within the limits of the city, impose upon the city the burden of keeping it in repair, yet if the city assumes control over the bridge, it would be liable to keep it in repair: *Id.*; see also *Manderscheid v. City of Dubuque*, 29 Iowa, 73; S. C., 4 Am. Rep. 196. The fact that a city can, under its charter, impose the duty of constructing sidewalks upon the lot-owners, cannot relieve it from liability in case a sidewalk, no matter by whom constructed, is suffered to be and remain out of repair and dangerous to use: *City of Bloomington v. Bay*, 42 Ill. 503. So where a statute confers on incorporated towns full control over their streets, a town cannot escape liability for an injury sustained by reason of the unsafe condition of its streets on the ground that they were put in such condition by the supervisor of the road district: *Clark v. Town of Epworth*, 56 Iowa, 462. A city, however, is not liable where the accident was claimed to have been occasioned by an alleged defect in the plan upon which a sidewalk was constructed: *Urquhart v. City of Ogdensburg*, 91 N. Y. 67; S. C., 43 Am. Rep. 91, note; also *City of Lansing v. Toolan*, 37 Mich. 152. Where a general statute under which a city was incorporated provided that the "city council shall have power * * * to cause the streets to be cleaned and repaired," a city is not liable for the neglect of the council to repair the streets: *Wisbicker v. Mayor etc. of Los Angeles*, 45 Cal. 36; *Trauter v. City of Sacramento*, 61 Id. 271; and where the charter of a city provided that the "board of aldermen should have power to lay out, extend, and alter streets and alleys," and "to provide for the construction, repair, and preservation of sidewalks, bridges," etc., while no particular stress was placed upon the words "board of aldermen," it was held to open streets, improve them, and to keep the sidewalks in repair were matters discretionary, and the city was not liable for the failure to repair a street after it had once been properly opened and put in good condition: *McDonough v. Mayor etc. of Virginia*, 6

Nev. 90. But this seems to us, in the light of the authorities, a very narrow ground on which to stand. The absence of necessary funds and of the legal means to procure them, it is held, will excuse the neglect to repair: *Hines v. City of Lockport*, 50 N. Y. 236; *Weed v. Village of Ballston Spa*, 76 Id. 329, 335; and see *Orth v. City of Milwaukee*, 18 N. W. Rep. 10; but it is no defense to an action against a city, for injury caused by the city permitting its streets to remain out of repair, that the city has no funds on hand to expend for repairing streets, and that the regular tax levy was exhausted, when the charter of the city permitted it, with the consent of a majority of its inhabitants, to levy a larger tax for purposes of general utility: *Erie v. Schwingle*, 22 Pa. St. 384; S. C., 60 Am. Dec. 87.

LIABILITY OF PROPERTY OWNER FOR NEGLECT TO REPAIR STREETS.—It is universally admitted, and held by the cases to be hereafter cited, that no common-law duty, and therefore no liability, rests upon the owner or occupant of premises fronting upon a public street or highway to keep such street or highway in repair. Thus in *Eustace v. Jahn*, 38 Cal. 3, it was held that the owner of land bordering on a public street was not liable for injuries through want of repair of the same, in the absence of a positive legislative enactment imposing a duty upon him to repair. The question then is, What is the liability of a property owner or occupant, for neglect to repair streets, when the duty is sought to be imposed by law or ordinance? The cases under this head, it is well to observe, should be distinguished from those based upon the negligence of the lot-owner or occupant in using the sidewalk or street, or in placing or permitting obstructions therein, for he is clearly liable for such acts of positive wrong: See *City of Keokuk v. Independent District of Keokuk*, 53 Iowa, 352; S. C., 36 Am. Rep. 226. Where neither statute nor ordinance attempts to cast upon the lot-owner the duty of making or repairing sidewalks, and the only statutory provisions authorize the city to make or repair sidewalks, and collect the cost thereof from the owner, permitting a defect to remain in the sidewalk may be negligence on the part of the city, but not on the part of the owner: *Jansen v. City of Atchison*, 16 Kan. 358. But suppose an ordinance should require owners or occupants of property to keep the sidewalks and streets adjoining their premises in repair, under certain prescribed penalties for neglect thereof, and perhaps adding a further proviso that on failure of the owner or occupant to make the repairs certain city officers should cause them to be made, the expense of which might afterwards be recovered from such owner or occupant, would this give the right to a private individual injured through the defective condition of the sidewalk or street to maintain a civil action for his injury? The cases which have arisen on this branch of the subject relate to the duty to remove ice and snow from sidewalks, under such ordinances, but the question is discussed in its most general form, and is answered by all in the negative: *Kirby v. Boylston Market Association*, 14 Gray, 249; *Vandyke v. City of Cincinnati*, 1 Disney, 532; *Flynn v. Canton Co.*, 40 Md. 312; S. C., 17 Am. Rep. 603; *Heeney v. Sprague*, 11 R. I. 456; S. C., 23 Am. Rep. 502; *Taylor v. Lake Shore etc. R. R.*, 45 Mich. 74; S. C., 40 Am. Rep. 457. In *Flynn v. Canton Co.*, *supra*, the court say: "Does liability to a private action follow from neglect to perform the duty or service thus prescribed? In our judgment, it does not. The whole design and effect of this ordinance was to secure the proper application of whatever labor and means were necessary to discharge the obligation then resting upon the city to keep its streets in a condition to be safely traveled. The work enforced under it, and the expense of doing it when performed by the employees of the city, together with the fines or penalties for neglect

which may be imposed and collected, relieves the city to that extent from charges to which it would be otherwise subjected. Stated in a different form, our view of the effect of this ordinance is this: at the time of its passage, it was the duty of the city to remove snow and ice from the sidewalks of its streets, so as to render them safely passable. The city was then provided with the means and power to discharge that duty. In the exercise of that power, it saw fit to provide by ordinance that the owners and occupants of premises abutting the sidewalks should either remove the snow and ice therefrom, or be charged with the cost of such removal if done by its own officers or employees, besides being subjected to a penalty for each neglect. The property owners were thereby made the agents of the city for that purpose, just as the police force was. The two are placed on the same footing with respect to the liability we are now considering. It is made the duty of the former to do it in the first instance, and the duty of the latter to cause it to be done in case of neglect or refusal by the former. If a private action for damages lies against the former by reason of neglect to discharge the duty imposed by this ordinance, it lies equally against the latter. If it lies against the latter, then every ordinance defining in similar terms the duties of police officers, street commissioners, and other officials, agents, or employees of the city, subjects them to a like responsibility. We cannot think such a result was ever contemplated by framers of ordinances of this character. Again: the persons upon whom this ordinance operates are provided with no means and armed with no power adequate to meet the responsibility that would be thus imposed on them. They are required to perform this service for the benefit of the public, either by their own labor, or through their own private and unaided resources. The proposition contended for by the appellant would subject to the same liability not only resident owners and occupants of property, but non-resident owners of vacant lots and houses, and persons having charge of the court-house, churches, and all other public buildings in the city. The duty or service here required is for the benefit of the public, and in consideration of no private pecuniary gain to those upon whom it is imposed. It is not like the case where an individual is bound by a private statute under which he derives a benefit, or by a certain tenure to keep a road or bridge in repair, nor like the case of turnpike companies or other private corporations charged with the performance of certain duties by the acts under which they are incorporated. In such cases the duty is perfect and binding at all times, and its neglect is followed by this responsibility, because it is founded upon a valuable consideration or made the condition of the grant."

Suppose, again, with such an ordinance in existence, that a city had been compelled to pay damages to a person injured by a sidewalk or street being out of repair, could it in turn recover this amount thus paid from the lot-owner or occupant? This question is likewise answered in the negative: *City of Hartford v. Talcott*, 48 Conn. 525; S. C., 40 Am. Rep. 189; 14 Rep. 429; *City of Keokuk v. Independent District of Keokuk*, 53 Iowa, 352; S. C., 36 Am. Rep. 226. In the first of these cases Pardee, J., says: "By passing this ordinance the city has not relieved itself from responsibility for the safety of travelers; it remains answerable for injuries resulting either from the negligence of the individual or its own omission to act. The labor performed by those who obey and the fines and expenses paid by those who do not, measure the extent of the advantages to be derived from the exercise of the power to pass it. Moreover, there not being upon the individual any liability at common law for injuries resulting from obstructions in the way, wholly the effects of natural causes, such liability is not brought into existence by force of decla-

rations in the ordinance that the obstructions are nuisances, or that it is the duty to remove them, for as the liability is the creation of the ordinance, it can be no greater than that specifically named therein; and as in the one before us the council measured it by a fine with cost of removal, the city has thereby barred itself from enforcing an unlimited liability beyond." And it would seem to follow, that if neither statute nor ordinance attempted to cast a duty upon the lot-owner to repair sidewalks, but the city was authorized to repair them, and collect the cost thereof from the owner, the city would have no recourse over against the lot-owner when it has been compelled to pay damages for the neglect: *Jansen v. City of Atchison*, 16 Kan. 358. Where it is not provided in the charter of a city or by general law that the lot-owner or occupant shall be liable for injuries to individuals caused by his neglect to repair sidewalks or streets, it is extremely doubtful whether a city can impose the liability, although it may punish by fine one who so neglects to repair: *Chambers v. Ohio Life & T. Co.*, 1 Dimey, 327; and see *Eustace v. Jahn*, 38 Cal. 3; compare *Taylor v. Lake Shore etc. R. R.*, 45 Mich. 74; 8 S. C., 40 Am. Rep. 457. In Cooley on *Torts*, 625, 626, the following language is used: "A city may impose the duty of making and keeping the sidewalks in repair upon the adjoining owners; but doing so does not relieve the city itself from responsibility to perform the duty imposed upon it by law; and if the duty fails in performance, the city and the individual in default may be united in a suit for the injury caused by the nuisance." The principal case relied upon by the author is *Davenport v. Ruckman*, 37 N. Y. 568, which does not seem to us to warrant such a broad proposition. It was an action against the owner of a building and a city to recover damages sustained by the plaintiff in falling into an uncovered and unguarded excavation which extended on the sidewalk several feet in front of the line or side of the street, with descending steps to a cellar-way in the front wall of the building. Both the defendants were held liable. It does not appear that the city had "imposed the duty of making and keeping the sidewalks in repair upon the adjoining owners" at all, nor under the circumstances of the case does this appear to us to be material. There was something more than mere non-feasance in this case, which clearly rendered the owner of the building liable.

PHILLIPS v. COFFEE.

[*17 ILLINOIS, 154.*]

DEFECTS OR IRREGULARITIES IN SHERIFF'S RETURN WILL NOT DEFEAT

TITLE OF PURCHASER who is not the plaintiff in execution, and who receives a good deed. The purchaser depends upon the judgment, levy, and deed, and all other questions are between the parties to the judgment and the officer.

MISRECOLTAL OF JUDGMENT IN SHERIFF'S DEED WILL NOT VITIATE OR DESTROY TITLE.

STRANGERS TO RECORD CANNOT COLLATERALLY INTERPOSE OBJECTIONS, which can alone be made in a direct proceeding by motion or writ of error.

PROOF THAT SEAL AFFIXED TO DEED IS CORPORATE SEAL IS UNNECESSARY when the deed is shown to have been duly executed by one having authority. Under such circumstances the seal is *prima facie* that of the corporation.

EJECTMENT, in which the plaintiff Coffee had a verdict. It appears from the bill of exceptions that one Nathan Phillips had entered the premises in controversy. After showing this entry, the plaintiff introduced in evidence a certified copy of a judgment for two hundred and forty-nine dollars and eight cents in favor of the State Bank of Illinois against Phillips, and of an execution issued thereon, on which the sheriff had made a return showing a levy and sale thereunder of the lands in question, but not stating the name of the purchaser. The plaintiff further introduced a sheriff's deed to the bank of the property, reciting the judgment as for two hundred and forty-nine dollars and eighteen cents; and also a deed of assignment from the bank to certain parties, signed by Thomas Mather, president, and purporting to be under the seal of the bank. The deed was not acknowledged, and no proof was made that the seal was the seal of the bank, but the signature of Mather was proved, and it was also proved that he was the president of the bank at the date of the deed. Deeds from these grantees to one Hamilton, and from Hamilton to the plaintiff, were then introduced. The defendants at the time objected to the introduction of the foregoing papers, but the objections were overruled, the defendants excepting. A motion for a new trial on account of the admission of improper evidence was overruled.

William A. and J. Grimshaw, for the appellants.

C. L. Higbee and M. Hay, for the appellee.

By Court, SCATES, C. J. The several deeds and other evidences of title were objected to, and those objections are presented for our revision, not as involving the power, but the regularity and sufficiency of the proof of the acts of the officers, bank, and assignees.

The judgment, execution, levy, and sale all appear to have been regular, and sufficiently and strictly in pursuance of the law: R. S. 1833, p. 372, sec. 8; and a deed made and acknowledged: Sec. 14, p. 375; and which deed so made is made evidence "that the provisions of the law in relation to sales of lands upon execution were complied with until the contrary be shown," and "shall be considered as conveying to the grantee therein named all the title, estate, and interest of the defendant" in the same in the land sold, of what nature soever the same be: Act 1841, p. 171, sec. 7. When plaintiff in execution is the purchaser, he shall be chargeable with full notice, and accountable for all irregularities: *Harrison v. Doe ex dem. Rapp*, 2 Blackf. 1. But there are none here alleged.

It is alleged that there is a variance between the judgment and execution read in evidence and that recited in the deed, and that the return on the execution does not show the name of the purchaser; and for which last reason the sale is void, under the statute of frauds, for want of a complete memorandum in writing of the bargain and sale.

The variance was a clerical mistake, and amendable, and a stranger to the record shall not be allowed collaterally to question it: *Bissell v. Kip*, 5 Johns. 100; *Laroche v. Washbrough*, 2 T. R. 737; *Jackson ex dem. Ten Eyck v. Walker*, 4 Wend. 464; *Jackson ex dem. Martin v. Pratt*, 10 Johns. 381. And in this last case the court permitted parol evidence to identify the premises sold and conveyed by the sheriff's deed, they not being described in the sheriff's return upon the execution, declaring such irregularity did not affect the legality of the sale. So under our statute a non-compliance with the statute does not make void the sale, but subjects the officer to a forfeiture: R. S. 1833, p. 372, sec. 8; *Stewart v. Croes*, 5 Gilm. 442; *Carpenter v. Schaffner*, 2 Ind. 465. Where, as here, the purchaser has a good deed, his title cannot be defeated by a defective return, nor even if there be no return at all. The purchaser depends upon the judgment, the levy, and the deed; all other questions are between the parties to the judgment and the officer. The statute of frauds may not be set up by them or strangers; for that would be a question between the officer and the purchaser: *Wheaton v. Sexton*, 4 Wheat. 503; *Doe v. Heath*, 7 Blackf. 154; *Hopping v. Burnam*, 2 G. Greene, 42; *Humphry v. Beeson*, 1 Id. 199, 215 [48 Am. Dec. 370]. A want of a return of a levy has been held not to vitiate: *Evans v. Davis*, 3 B. Mon. 346; *Doe ex dem. McEntire v. Durham*, 7 Ired. L. 152.

Neither would a misrecital of the judgment in the deed vitiate or destroy the title: *Jackson ex dem. Martin v. Pratt*, 10 Johns. 381; *Jackson ex dem. Hill v. Streeter*, 5 Cow. 529; *Jackson ex dem. Wetherell v. Jones*, 9 Id. 182.

This court has held that irregularities do not avoid the sale, and that strangers may not interpose collaterally objections which can alone, as between the parties, be made in a direct proceeding by motion or writ of error: *Swiggart v. Harber*, 4 Scam. 364 [39 Am. Dec. 418]; *Rigg v. Cook*, 4 Gilm. 336 [46 Am. Dec. 462].

And in *Voorhees v. Bank of the United States*, 10 Pet. 478, where one had bid off the property and the deed was made to another, that is a matter entirely between those persons, and

the defendant in execution has nothing to do with it, for his right is extinguished by the sale. Here, as in that case, taking the levy, return, and deed together, and a sufficient case is made out under the statute of frauds, and the judgment debtor could have no right to complain, even had he the right thus collaterally to object, much less can these plaintiffs, who have shown no title and no connection with that suit.

The remaining question is to the admissibility of the deed of assignment by the bank to the trustees, and for want of proof that the seal thereto was the seal of the bank. This is unnecessary here. Its execution by the president of the bank is shown, and the seal affixed affords *prima facie* evidence that it is the seal of the bank. And this rule does not dispense with evidence that the seal is the seal of the corporation, but adopts as a rule of *prima facie* evidence that when an instrument is duly executed by one having authority, the seal he attaches is the seal of the corporation until it is impeached and shown otherwise: *Angell & Ames on Corp.*, pp. 192-4, secs. 6, 7, and references; *Lovett v. Steam Saw-mill Ass'n*, 6 Paige, 54; *Prop'res of Mill-dam Foundery v. Hovey*, 21 Pick. 417; *Flint v. Clinton Co.*, 12 N. H. 430; *Reynolds' Heirs v. Trustees of Glasgow Academy*, 6 Dana, 37; *Corrigan v. Trenton Delaware Falls Co.*, 1 Halst. Ch. 52; *Johnson v. Bush*, 3 Barb. Ch. 207. And it is held in some of the above cases that when the seal is proved to be the seal of the corporation, and to have been set to the deed by the agent, it is *prima facie* evidence of his authority to do the act.

The ancient strictness of proof of the seal being the device and seal adopted by the corporation has been greatly relaxed. And this is indeed indispensable under the very great multiplication of corporations of a public and private nature, which have become the most desirable and convenient mode of association of capital for the varied transactions in manufacturing, carrying, and trading. It would in most instances be difficult, and in a great many impossible, for persons with whom they deal, strangers to the proceedings of corporate boards, to prove that a particular device had been adopted by them as a seal. More particularly in such cases as those in Kentucky, where a scroll with ink is allowed, as it is with us. It might be impossible to prove this to be the device adopted otherwise than by its use, and its being affixed as such by a proper officer or agent. This should be received as *prima facie* evidence, and the company required to answer and rebut it. I know that stricter proof is

required in England, and in some of the states: See 21 Eng. Com. L. 447 [mis cited]; *Leasure v. Hillegas*, 7 Serg. & R. 313; *Mann v. Pents*, 2 Sand. Ch. 257; *Perry v. Price*, 1 Mo. 645.

It is needless to multiply authorities, nor do I propose to discuss the rule, or the soundness of the rule, of relaxation in the proof. Whatever of danger there may be in it to corporations is no greater than that to others in the strict rule in the multiplied transactions of the present day. Similar modifications have been made in our notions of the very reason itself for a sealing in modern times when almost all can write.

We can, under this view, find no valid objection to any of the proof offered.

Judgment affirmed.

PURCHASER'S TITLE NOT AFFECTED BY ABSENCE OR IRREGULARITIES IN RETURN ON EXECUTION: *Waters v. Duvall*, 33 Am. Dec. 693; *Gilman v. Thompson*, 34 Id. 714; *Byer v. Etnyre*, 41 Id. 410; *Ingram v. Belk*, 47 Id. 591; note to *Humphry v. Beeson*, 48 Id. 374; *Banks v. Evans*, Id. 734; *Hinds's Heirs v. Scott*, 51 Id. 506; *Brooks v. Rooney*, 56 Id. 430; and see *Walker v. McKnight*, 61 Id. 190. The principal case is cited to this point in *Kinney v. Knoebel*, 47 Ill. 420; *Jackson v. Spink*, 59 Id. 409; *Holman v. Gill*, 107 Id. 475; *Durham v. Heaton*, 28 Id. 272. The purchaser relies upon his judgment, execution, levy, and deed. And a purchaser, who is not a party to the judgment, need not concern himself in regard to any equities between the parties; he is only bound to look to the judgment, the levy, and the sheriff's deed for his protection: *Davis v. Moore*, 103 Id. 449.

MISRECITAL OF JUDGMENT IN SHERIFF'S DEED NOT FATAL: *Humphry v. Beeson*, 48 Am. Dec. 370; *Howard v. North*, 51 Id. 769; and see *Perkins's Lessee v. Dibble*, 36 Id. 97, and note; *Hinds's Heirs v. Scott*, 51 Id. 506; but see *Dufour v. Camfranc*, 13 Id. 380; *Den ex dem. Swan v. Deepreaux*, 22 Id. 485, and note. The principal case is cited to this point in *Loomis v. Riley*, 24 Ill. 309; and in *Keith v. Keith*, 104 Id. 401, it is cited to the effect that a misrecital of the judgment and execution in a sheriff's deed, where they are so described that they may be fully identified, is not fatal.

IRREGULARITIES IN EXECUTION SALES, WHEN AND BY WHOM TAKEN ADVANTAGE OF.—Irregularities cannot be taken advantage of collaterally: *Lowber & Wilmer's Appeal*, 42 Am. Dec. 302; *Reed v. Austin's Heirs*, 45 Id. 336; *Rigg v. Cook*, 46 Id. 462; *Newton v. State Bank*, 58 Id. 363. See the principal case cited to this effect in *McCormick v. Wheeler*, 36 Ill. 119; *Jackson v. Spink*, 59 Id. 409. So a slight discrepancy between the amount of a judgment as entered and the amount of the debt in the execution docket is a mere clerical mistake which cannot be taken advantage of collaterally: *Becker v. Quigg*, 54 Id. 296, citing the principal case. And irregularities in the sale or judgment cannot be taken advantage of by third persons, but only by the defendant in execution, or those claiming under him: *Hollowell v. Skinner*, 40 Am. Dec. 431; *Lowber & Wilmer's Appeal*, *supra*; and see *Harrington v. O'Reilly*, 48 Id. 704. The principal case is cited to this point, substantially, in *McCormick v. Wheeler* and *Jackson v. Spink*, *supra*. A sheriff's deed cannot be collaterally impeached for irregularity: *Ware v. Bradford*, 36 Am. Dec. 427.

PROOF OF SEAL OF CORPORATION IS UNNECESSARY, when it is affixed by the proper officer or agent of the company: *Susquehanna Bridge etc. Co. v. General Ins. Co.*, 56 Am. Dec. 740; compare *Den v. Freelandt*, 11 Id. 551. The appearance of a corporate seal to a writing is evidence that it was affixed by proper authority: *Leggett v. N. J. Mfg. etc. Co.*, 23 Id. 728. The principal case is cited in *Miller v. Superior Machine Co.*, 79 Ill. 452, to the point that in the absence of proof the presumption is that a seal used by a corporation was its proper and only seal; and in *Sawyer v. Cox*, 63 Id. 134, 135, as holding that the execution of a deed by the president of a bank, with the seal annexed, afforded *prima facie* evidence that it was the seal of the bank, and the instrument was held valid; see also *Smith v. Smith*, 62 Id. 497.

RUFFNER v. McCONNEL.

[17 ILLINOIS, 212.]

DEED WILL BE REFORMED FOR MISTAKE OF FACT only upon clear and satisfactory evidence of the mistake; but this does not extend to mistakes of law, or to mistakes in the intention of one only of the parties without fraud in the other.

PARTNER HAS NO POWER TO CONVEY REAL ESTATE OF FIRM, either by deed or assignment, nor to make contracts, written or verbal, concerning it, specifically enforceable against his copartners.

DEED WILL NOT BE REFORMED AS TO COVENANT THEREIN after an action for its breach has been brought against the defendants by the complainant, who suffered a recovery against him for costs.

BILL to reform a deed for mistake, and to recover damages for the breach of a covenant of general warranty therein contained as reformed. The bill sought to have the word "they" inserted in the covenant, so as to make it the personal covenant of the grantors, the defendants McConnel and Vansyckel, who covenanted simply that "their heirs, executors, and administrators will warrant and defend title to said premises." This deed had been made by McConnel and Vansyckel, who were partners, in consideration of a firm debt, to one Fielder, under whom the complainant claimed by virtue of a quitclaim deed. The land was afterwards ordered sold and conveyed for the benefit of the complainant in an equity suit, in which all the foregoing parties were made defendants. It appeared that the land was originally bought by Vansyckel at a sheriff's sale, and the title taken in the names of both Vansyckel and McConnel without the knowledge of the latter, who, when the facts were ascertained, consented to sign a quitclaim deed for the purposes of conveyance, but refused to enter into a covenant of warranty; although it was evidently Vansyckel's intention and agreement to give such a covenant. A previous action on the covenant had been brought

against the defendants in this suit by the complainant, who suffered a recovery against him for costs. A decree was made dismissing the original bill and a cross-bill of McConnel.

D. A. Smith, for the plaintiff in error.

M. McConnel and J. Grimshaw, for the defendants in error.

By Court, SCATES, C. J. The bill seeks to correct a mistake of fact, alleged to have been made by omitting to insert the word "they" in the covenant of warranty in a deed of conveyance, so as to make it a personal covenant of the vendors; and thereupon, for relief by decree for the purchase money, with interest, on breach of the covenant so reformed, by recovery from vendors and vendee by paramount title in a case in equity, to which all were parties defendants.

We do not think the record shows a case for the interposition of a court of equity. We recognize a mistake in fact as a ground for equitable jurisdiction; but relief will only be granted upon clear and satisfactory proof of the mistake in fact: *Harris v. Reece*, 5 Gilm. 212; *Selby v. Geines*, 12 Ill. 69; 1 Story's Eq. Jur., secs. 110, 151-153.

But this does not extend to mistakes in the law of the contract, case, or legal meaning of the terms agreed on between the parties, without fraud: 1 Story's Eq. Jur., secs. 111, 115; *Beebe v. Swartwout*, 3 Gilm. 162. Nor mistakes in the intention of one only of the parties and without fraud in the other: *Cof-fing v. Taylor*, 16 Ill. 457.

We may admit, without discussion of the evidence, that a mistake has been shown as to the kind of covenant Vansyckel intended and agreed to enter into, and that the deed of both should contain; yet the evidence shows that McConnel did not agree personally, but, on the contrary, expressly refused to enter into a covenant of warranty. Defendants were partners, and liable as such for the debt, which was paid with the land, notwithstanding the private agreement between them that Vansyckel should pay all the debts, and be liable therefor. Although this land was transferred to and the title held by the partners, and liable to partnership debts, yet the plaintiff's abstract equity against McConnel is weakened by the fact that it was the private transaction, if not the private property, of Vansyckel, and taken in the names of both at his instance and without McConnel's knowledge, and who only afterwards consented to transfer or convey, that the property might pass out of him again for what it might be worth.

The solution of the facts in the case, however, depends upon the legal power of one partner, generally, to convey or make such contracts, verbal or written, as will pass the title of real estate belonging to the firm, or which may be specifically enforced in equity by compelling the other partner to execute a conveyance, with or without particular covenants, or by decree for such a conveyance, by a commissioner of the court. This would be the result if the power exists in each partner to bind the other in relation to the realty. I do not speak of such contracts in relation to the liability of partners for damages for their breach, but in relation to specific execution of them and conveyances by one for all the partners.

In this point of view, under the law governing partnerships, one partner has not the power to convey the real estate of the firm, either by deed or assignment; nor make contracts, written or verbal, specifically enforceable against the others: Collyer on Part., secs. 135, and notes, 394; Story on Part., sec. 101, and notes; Story on Agency, c. 6, sec. 125; *Piatt v. Oliver*, 3 McLean, 28. See *Tapley v. Butterfield*, 1 Met. 515 [35 Am. Dec. 373]; *Deckard v. Case*, 5 Watts, 22; *Sloo v. President etc. State Bank of Illinois*, 1 Scam. 428.

Lands belonging to the partnership are nevertheless, equally with the personality, liable to the payment of the debts of the firm, and will go into the balance of account between the partners on settlement of profit and loss: See same authorities. But in the transfer of lands, the rules applicable to the conveyance and descent of realty are to be observed, as they are not modified by nature of the ownership; nor have partners, under the law of partnerships, an implied power, individually, for the firm to do what may be done by a court of equity in paying creditors or adjusting balances between the partners. They must observe all the solemnities, and convey in the modes recognized by law for the transfer or conveyance of real estate. By these, a coparcener, joint tenant, or tenant in common has no power to bargain, sell, or convey the real estate, or interest in it, of his co-tenant. The agreement of Vansyckel, as partner, was not, therefore, obligatory upon McConnel to make any kind of conveyance of this land, either in law or equity. The plaintiff should have protected himself by refusing to take any other than such a conveyance as suited or would protect his title. Upon defendant's declining to give a warranty, he should have refused to receive the one tendered; and if he had any personal remedy against the firm, for damages for breach of such

an agreement by one partner—upon which we express no opinion—he should have brought his action upon the contract for breach, and not a bill for specific execution.

The right to a decree is very questionable, upon another ground, even against Vansyckel alone, upon any covenant in, or that should have been in, this deed as to him; for he alone might have made his covenant of warranty in it, had it been asked and required.

The plaintiff has brought his action of covenant on this very covenant, for a breach, against both defendants, and suffered a recovery against him for costs, and which has been affirmed in this court: *Ruffner v. McConnel*, 14 Ill. 168.

We are not able to distinguish the case in principle, if it be at all in the facts in this respect, from the case of *Sibert v. McAvoy*, 15 Ill. 106, where the plaintiff first sued upon the contract at law, and after judgment; then filed his bill to reform the contract by correction of an alleged mistake. The court held that the contract was merged in the judgment, and there was no contract left to be reformed or corrected.

Under this view of the case, we need not examine into the question whether the recovery in equity against warrantors and warrantee, by paramount title, is sufficient showing of a breach, without further actual eviction.

Decree affirmed.

SKINNER, J. I agree that Vansyckel could not bind McConnel, his copartner, to execute a deed with covenants of general warranty, and that upon this record the decree should be affirmed.

REFORMATION OF INSTRUMENT WHEN GRANTED, FOR MISTAKE: See *Leaveitt v. Palmer*, 51 Am. Dec. 333; *Stone v. Hale*, 52 Id. 185; *Wood v. White*, Id. 654; *Mosby v. Wall*, 55 Id. 71; *Leitensdorfer v. Delphy*, Id. 137; *Greer v. Caldwell*, 58 Id. 553, and notes to these cases, where prior decisions are collected.

CONVEYANCE OR MORTGAGE OF PARTNERSHIP REALTY BY ONE PARTNER ALONE: See *Coles v. Coles*, 8 Am. Dec. 231; *McDermot v. Lawrence*, 10 Id. 468; *Donaldson v. Bank of Cape Fear*, 18 Id. 577; *Baca v. Ramoe*, 29 Id. 463; *Dyer v. Clark*, 39 Id. 697; *Buchan v. Sumner*, 47 Id. 305.

THE PRINCIPAL CASE IS CITED in *Comstock v. Brosseau*, 65 Ill. 43, to the point that one obligee in a bond conveying real estate cannot surrender the interest of another without his consent.

GREEN v. WARDWELL.

[17 ILLINOIS, 278.]

OFFICIAL BOND OF JUSTICE OF PEACE BECOMES OBLIGATORY from the time it is delivered to the county clerk for his approval, although not actually approved by him, if he does not reject it.

SURETIES OF JUSTICE OF PEACE DE FACTO ARE LIABLE ON THEIR BOND.
BOARD OF SUPERVISORS ARE LEGAL SUCCESSORS TO COUNTY COMMISSIONERS' COURT, in Illinois, where the township organization is adopted, and as such succeed to the legal title to official bonds, on which they may bring suit.

DEBT on an official bond against a justice of the peace and his sureties. Judgment for the plaintiffs. The facts sufficiently appear in the opinion.

West and Grover, for the appellants.

Williams and Lawrence, for the appellees.

By Court, CATON, J. This was an action of debt on an official bond against a justice of the peace and his sureties, assigning as a breach his failure to pay over money which the justice had collected in his official capacity. The suit is brought in the names of the supervisors, as the board of supervisors of Adams county, as successors in office of the county commissioners of Adams county, to whom and their successors, as the statute required, the bond was made payable. The questions presented arise upon demurrers to the pleas, of which it is only necessary to notice those relied upon in the argument, which are: 1. That Hobbs was not duly elected a justice of the peace; 2. That the bond sued on was not duly approved; 3. That he was not sworn as a justice of the peace; 4. That he was not duly commissioned; 5. That the notes and accounts on which the money sued for was collected were not left with him as a justice of the peace; 6. That at the time the money was received he was not a justice of the peace in manner and form as alleged in the declaration. To these several pleas a demurrer was sustained, which is now assigned for error.

Upon these pleas two questions arise: 1. Whether any liability can arise upon the official bond of a justice of the peace before it is actually approved by the county clerk, as required by the statute; and 2. Whether the sureties of a justice of the peace *de facto* are liable upon their bond; or in other words, whether the official bond of a justice of the peace *de facto* is an obligatory instrument. We have no hesitation in answering both questions in the affirmative, and that the demurrer was

properly sustained. When the bond was executed by the parties and delivered to the clerk for his approval, it became obligatory, unless it was actually disapproved by him. His mere non-action on the subject did not deprive the justice of his power to act, nor did it absolve his sureties from their undertaking that he should act with fidelity. Both he and they had done all they could to comply with the law, so that he might legally discharge his official duties. The mere omission of the clerk to discharge his duty in formally approving the bond should not be held to prejudice the public, or those who resorted to or were brought before him to submit to his adjudications. If the clerk was not satisfied with the sureties, it was his duty to disapprove of the bond so that the justice might find other and satisfactory sureties. If this was not done, upon principle, the bond became obligatory to secure the rights of the public and third persons. The clerk, indeed, might be prosecuted for a misdemeanor for having neglected to perform an official duty, to formally pass upon the sufficiency of the bond. But the bond itself, we have no doubt, was binding upon the parties from the moment it was delivered to the clerk.

The other question is, if possible, attended with less difficulty. The public is not bound to inquire into all the technical questions which may affect the right of the officer to the office which he holds. Although he may have been elected by illegal votes, or may have been ineligible to the office; although the great seal of state may not have been impressed upon his commission, or although even no commission at all may have been issued to him, or although he may never have taken an official oath, or although he may have been elected to the legislature, which is an office incompatible with that of justice of the peace—still, so long as he continued to discharge the duties of a justice of the peace, and held himself out to the world as such, his official acts were binding, not only upon suitors, but also upon his sureties, and they continue bound upon their obligation. By signing his bond, they acknowledged his right to the office, and to discharge its duties, and as such recommended him to the public. They, at least, shall not be heard to say that, although they signed his bond, and thereby induced others to put money in his hands, relying on their bond for its safety, still he was not elected, was not commissioned, was not sworn; that he was not in fact a justice. If he had ceased to be a justice, the plea should have shown how he had ceased, so that the courts, seeing the facts, could determine, as a matter of law, whether or not

he was still a justice. While he acted as such, and as such collected this money, he must be regarded as an officer *de facto*, although, as the plea states, he had been elected to another office, which, in point of law, rendered him ineligible to the office of justice of the peace.

I may notice separately one of these pleas which attempts to present a different question; and that is the one in which it is said that the notes and accounts were not left with him as justice of the peace. It is of no moment in what capacity he received the evidences of the debts. The question is, In what capacity did he receive the money? The declaration charges him with receiving the money as a justice of the peace, and this is not denied by the plea.

But admitting the legal liability of the defendants upon the bond, they propose to carry the demurrer back to the declaration, and insist that the suit is not properly brought in the name of the board of supervisors as successors to the county commissioners' court. We think this objection fully answered by this court in the case of *People v. Thurber*, 13 Ill. 554. I do not now feel called upon again to examine the legislation and legislative intent relating to the adoption of the township organization, and the changing of the county governments from one form to the other. The board of supervisors were the legal successors to the county commissioners' court, and as such succeeded to the legal title to this official bond. We think the suit was properly brought. There was no error in sustaining the demurrer to the pleas, and the judgment of the circuit court must be affirmed.

SKINNER, J., having tried this cause as judge of the circuit court, did not participate in the decision in this court.

Judgment affirmed.

FAILURE TO APPROVE BOND, EFFECT OF: See *Auditor v. Woodruff*, 33 Am. Dec. 368; *Jones v. State*, 37 Id. 180. The principal case was followed in *Bartlett v. Board of Education*, 59 Ill. 367, 368, on the point that where the bond of a treasurer of a school district was received by the board of education and acted upon by the parties, it was a sufficient approval, without a formal approval entered upon the bond itself, or the record of their proceedings; if the bond was not satisfactory, it was the duty of the board to have rejected it, so that the treasurer might obviate the objection.

SURETIES OF OFFICERS DE FACTO ARE LIABLE ON BOND: See *Jones v. Scotland*, 44 Am. Dec. 300. The principal case was quoted and followed in *Show v. Hawley*, 21 Ill. 128, on the point that in an action upon a constable's bond the obligees cannot be permitted to deny that he was constable; and it

was also followed in *Albes v. People*, 22 Id. 534, on the point that a party who has executed a bond as surety, declaring that the principal in it, who was coroner, had succeeded to the office of sheriff, cannot gainsay the fact so as to release himself from liability. On the proposition that sureties cannot impeach or deny the validity of their bonds, see *Kincannon v. Carroll*, 30 Am. Dec. 391; *Stephens v. Crawford*, 44 Id. 680.

BOARDS OF SUPERVISORS ARE LEGAL SUCCESSORS TO COUNTY COMMISSIONERS' COURTS, in Illinois, where the township organization is adopted: *Board of Supervisors v. Patterson*, 58 Ill. 119; *Smith v. Board of Supervisors*, 59 Id. 422; *Gillett v. Board of Supervisors*, 67 Id. 259; *County of McDonough v. Markham*, 19 Id. 151; all citing the principal case to this point.

THE PRINCIPAL CASE IS QUOTED WITH APPROVAL in *Smith v. Board of Supervisors*, 59 Ill. 423, to the point that where, in an action of debt by a board of supervisors against a surety on the bond of a county treasurer to recover for an alleged defalcation, the pleas fail to negative the receipt of money as county treasurer, as was averred in the declaration, they were in that respect bad.

JOHNSON v. RICHARDSON.

[17 ILLINOIS, 302.]

NON-JOINDER OF JOINT OWNER OF PROPERTY IN ACTION IN TORT FOR DAMAGES for a breach of duty, and not for the specific property, can only be taken advantage of by plea in abatement; and in the absence of such plea, the owners suing may recover their proportion of the damages sustained by all, leaving the other joint owner to afterwards sue and recover his proportion of the whole damages.

INNKEEPER IS BOUND TO KEEP SAFELY AND WELL PROPERTY OF GUESTS, and in case of loss or injury he can only absolve himself from liability on his part by showing that the loss or injury was without his fault. The burden of proof is upon him. If, however, the guest unnecessarily exposes his property or money to danger, or unnecessarily carries with him large sums of money, the rule might be otherwise.

GUEST OF HOTEL IS NOT REQUIRED TO PLACE HIS VALUABLES IN CUSTODY OF INNKEEPER, even though the innkeeper has an iron safe for that purpose, and the guest knew of that fact.

CASE. The facts are stated in the opinion.

A. Lincoln, for the appellant.

S. T. Logan, for the appellees.

By Court, SKINNER, J. This was an action on the case by Richardson and Hopkins against Johnson. One Brush, who was a copartner of the plaintiffs below, having in his possession four hundred and thirty-four dollars of the partnership money, in company with one Thompson arrived by railroad late in the night at Springfield, and put up at the hotel of the defendant.

Thompson, in the presence of Brush, deposited with the clerk

of the hotel a package of three thousand dollars, which he was conveying for other persons, and the same was placed in an iron safe kept in the office of the hotel for such purposes.

After supper Brush and Thompson were put into one room to lodge, Brush having the four hundred and thirty-four dollars in his pocket, and Thompson having some three hundred dollars in his pocket. They found a good lock on the door and locked it, leaving the key in the lock on the inside, and the room was apparently safe against entry by thieves. In the morning the door was found open and Brush's money stolen, but Thompson's was not.

No special notice was given as to the keeping of valuables, nor touching liability for their loss. The cause was tried by jury, a verdict found against the defendant for two hundred and eighty-six dollars, and judgment was rendered thereon. The defendant asked for two instructions which the court refused to give, and upon these instructions the only questions of law involved in the case arise.

The first is based upon the supposition that the plaintiffs cannot maintain their action because of the non-joinder of Brush, who was joint owner with them of the money stolen. The action is in tort founded on a breach of duty devolved by the law upon the defendant by reason of his calling—a duty the law imposes on him towards all his guests, from considerations of public policy and without regard to any implied contract of bailment.

The proper plaintiffs in actions in form *ex delicto* for injuries to, loss or destruction of, property are all the joint owners of such property; but where the remedy adopted seeks the recovery of damages, and not the specific thing, the non-joinder of one or more of the joint owners can only be taken advantage of to defeat the action by plea in abatement. If such plea be not interposed, the plaintiffs may recover according to their proportionate interests in the property injured, or their proportion of the damages sustained by all; and the other joint owners not joined may afterward sue and recover their proportion of the whole damages. Therefore the non-joinder of Brush under the general issue could only be available to lessen the plaintiffs' damages; and the damages actually recovered in this case was these plaintiffs' portion only of the whole money stolen: 1 Ch. Pl. 76; 2 Saunders' Pl. & Ev. 536; *Edwards v. Hill*, 11 Ill. 22; *Hart v. Fitzgerald*, 2 Mass. 509; *Wheelwright v. Depeyster*, 1 Johns. 471 [3 Am. Dec. 345]; *Brotherson v. Hodges*, 6 Id. 108; *Bradish v. Schenck*, 8 Id. 151.

The second instruction refused assumes the law to be that if the defendant kept an iron safe for the deposit and safe-keeping of money of his guests, and Brush knew the fact, but chose himself to keep the money, the defendant as innkeeper is not liable for the loss.

The general doctrine deducible from the authorities, ancient and modern, is that keepers of public inns are bound well and safely to keep the property of their guests accompanying them at the inn; and in case such property is lost or injured, the innkeeper can only absolve himself from liability by showing that the loss or injury occurred without any fault whatever on his part; or by the fault of the guest, his companions or servants; or by superior force; and the burden of proof to exonerate the innkeeper is upon him, for in the first instance the law will attribute the loss or injury to his default.

These rules, though seemingly hard on innkeepers, are founded on considerations of public utility, and deemed essential to insure a high degree of security to travelers and strangers, who of necessity must trust to and confide in the honesty and vigilance of the innkeeper and those in his employ: 2 Kent's Com. 592-596; Jones on Bail. 95, 96; Story on Bail. 471, 472. Some of the cases hold innkeepers liable in regard to the property of the guest at the inn to the same extent as common carriers are in reference to goods committed to them for transportation; that is, for all loss or injury not the result of inevitable accident.

But it is not necessary in this case to extend the doctrine relating to the liability of innkeepers beyond the limit of universal recognition: *Richmond v. Smith*, 8 Barn. & Cress. 9; *Bennett v. Mellor*, 5 T. R. 273; *Quinton v. Courtney*, 1 Hayw. 40; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *Mason v. Thompson*, 9 Pick. 280 [20 Am. Dec. 471]; *Shaw v. Berry*, 31 Me. 478 [52 Am. Dec. 628]; *Berkshire Woolen Company v. Proctor*, 7 Cush. 417; *Piper v. Manny*, 21 Wend. 282; *Newson v. Axon*, 1 McCord, 509; *Metcalf v. Hess*, 14 Ill. 129.

In this case the money is shown to have been stolen, and it being the duty of the innkeeper to keep honest and faithful servants, and to use every practical guard against thieves, *prima facie* the law holds him responsible for the loss, for from the nature of the case the guest cannot be presumed to have the means of proving who is the guilty party, nor of establishing the fact of delinquency on the part of the innkeeper.

Every traveler must carry with him more or less money, and it would be unreasonable to limit him to a sufficient amount for

immediate use. His journey may be long, and its exigencies may require a much larger sum than the amount in this case. Strangers are usually compelled to rely wholly on their money for living and transportation, and without money their condition would be such as none would willingly hazard.

To compel them to place their money in the custody of the innkeeper, his clerk or servant, would create new perils in traveling, and place the guest at the mercy of the publican, honest or dishonest, and he would be likely to know nothing of the character of the person into whose keeping he might chance to fall.

If the traveler is compelled to give his money over for safe-keeping on his arrival at a hotel, what proof could he be expected to retain of the fact, or of the amount? And how practically unavailing would be the remedies of the law in case of the dishonesty of those to whom the surrender must be made. Such a rule we think not only inconvenient, but unreasonable and impracticable.

We do not intimate an opinion that innkeepers are responsible in all cases of loss of their guests' property; the guest may unnecessarily expose his money to danger or unnecessarily carry with him large sums, which no prudent man would do in a country where exchange can be readily obtained.

In this case, the sum was not unreasonably large to carry about the traveler's person, and we cannot hold that he was at fault in not depositing it with the innkeeper.

Judgment affirmed.

NON-JOINDER OF PARTIES PLAINTIFF, HOW TAKEN ADVANTAGE OF: See *Hoffar v. Dement*, 46 Am. Dec. 628; *Deal v. Bogue*, 57 Id. 702; *Raney v. McRue*, 60 Id. 660, and notes to these cases. The principal case is cited in *Chicago etc. R. R. v. Todd*, 91 Ill. 73, to the point that in an action of tort the non-joinder of a person as plaintiff might be pleaded in abatement.

INNKEEPER'S LIABILITY FOR GOODS OF GUEST: See *Mateer v. Brown*, 53 Am. Dec. 303, and note collecting prior cases; *Shaw v. Berry*, Id. 628; *Eppes v. Hinds*, 61 Id. 528; also *Dickinson v. Winchester*, 50 Id. 780.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

DICKERSON v. BOARD OF COMMISSIONERS OF RIPLEY
COUNTY.

[6 INDIANA, 128.]

COMPLAINANT NEED ONLY INDORSE RELEASE OF ERRORS ON BILL FOR INJUNCTION against collection of a judgment at law, under the Indiana revised statutes of 1843, when he is required so to do by the judge granting such injunction, or by the court.

SURETY IS DISCHARGED BY PAYEE'S EXTENDING TIME OF PAYMENT TO PRINCIPAL by an agreement supported by a sufficient consideration without the consent of the surety, the payee being equitably estopped.

PAYMENT OF INTEREST IN ADVANCE IS SUFFICIENT CONSIDERATION to support an agreement for further forbearance.

RELATION OF PARTIES AS PRINCIPAL AND SURETY MAY BE SHOWN, even as against the payee or obligee, for the purpose of letting in any act of the latter tending to affect the collateral relations of the makers or obligors, and even when the instrument is joint and several, and wholly silent as to which is the surety.

FORBEARANCE TO SUM PRINCIPAL WILL DISCHARGE SURETY, although it be for a limited time only.

INSTRUMENT UNDER SEAL MAY BE RELEASED OR DISCHARGED BY EXHIBITED PAROL AGREEMENT, although this cannot be done by a mere parol agreement.

EQUITABLE ESTOPPEL IS DEFENSE AVAILABLE AT LAW as well as in equity. **PARTY'S FAILURE TO MAKE DEFENSE AT LAW THROUGH MISTAKE AS TO HIS RIGHTS** does not entitle him to relief in chancery.

BILL in chancery. The facts are stated in the opinion.

E. Dumont, for the appellants.

J. Ryman, for the appellees.

By Court, STUART, J. Bill in chancery by sureties to enforce an alleged equitable estoppel.

The bill alleges that Dickerson and John L. Shook were sureties, and David P. Shook principal, in a surplus revenue bond for the loan of two hundred and three dollars, executed on the eleventh of February, 1847, with interest payable in advance. The bond is stated to have been joint and several, but that the relation of principal and surety subsisting between the obligors was well known to the county officers with whom the loan was negotiated. It was due February 11, 1848. On the third of March, 1848, the ninth of March, 1849, and the fifth of February, 1851, respectively, a year's interest was paid by David P. Shook, which settled the interest payable in advance up to February 11, 1850.

The complainants aver that in consideration of these payments, the officers having control of the surplus revenue fund extended the time of payment of the principal sum to the said David without the consent or knowledge of his sureties.

It is further alleged that in September, 1851, a judgment at law was recovered on the bond against all the parties by default. And the reason set up for not defending at law is, "because your orators were informed, and believed, that their defense was of an equitable, and not of a legal, nature, and hence could not avail themselves of their said defense at law." The prayer of the bill is for answer, etc., that the collection of the judgment be enjoined, and for general relief.

Demurrer to the bill sustained; and, on complainants failing to amend, dismissed.

It is objected that there is no release of errors. The objection is not well taken. *Addleman v. Mormon*, 7 Blackf. 31, is referred to in support of the objection; but that decision is on a statute different from the one governing this case. These proceedings were had while the statute of 1843 was in force. The provision on that subject is that "such complainant shall indorse and sign on his bill a release of errors in said judgment whenever required so to do by the judge granting such injunction, or by the court:" R. S. 1843, p. 852, sec. 130. To make the objection available, it should appear that such an order had been made, and that the complainant had failed to comply. It is only when required to do so that he is to indorse a release of errors on his bill.

The main question in the case, viz., the doctrine of equitable estoppel, though urged by complainants, is not discussed by the defendants' counsel. It is not proposed to go into it further than the case made in the bill requires.

Equitable estoppel is generally thus defined: when the payee, upon an agreement supported by a sufficient consideration, extends time of payment to the principal, without the consent of the surety, the latter is discharged, the payee being equitably estopped.

The instrument by which these parties were bound reads in these words: "We, or either of us, promise to pay to the state of Indiana, for the use of the surplus revenue deposited with the state of Indiana, on or before the eleventh day of February, 1848, the sum of two hundred and three dollars and twenty-seven cents, with interest thereon at the rate of seven per cent per annum in advance, commencing on the eleventh day of February, 1847, and do agree that in case of failure to pay the principal or interest when due, five per cent damages on the whole sum due shall be collected, with costs, by action of debt, in any court of competent jurisdiction. Witness our hands and seals, February 11, 1847. David P. Shook [seal], Telford Dicker-
son [seal], John L. Shook [seal]."

Here, it will be perceived, is a direct liability under seal. The sureties do not undertake collaterally. The agreement to pay is joint and several, and made directly to the state, for the use, etc. These features, it will be seen, divest the case of part of the subtleties surrounding the question.

That the payment of interest in advance is a sufficient consideration to support an agreement for further forbearance, is too well settled to admit of discussion: *Bailey v. Adams*, 10 N. H. 162; *Fowler v. Brooks*, 13 Id. 240; *McComb v. Kittridge*, 14 Ohio 348; *Harbert v. Dumont*, 3 Ind. 346. Here, it is alleged, that upon a contract for forbearance, in consideration of the payment of interest, the time was extended from year to year without the consent of the sureties.

Without stopping to inquire what subtle distinctions the authorities draw against the complainants, even on this state of facts, and without reference to the surplus revenue acts, we proceed at once to the main question. Was this defense available in equity only, or was it also available at law?

Admitting it to have been available in equity only, it might be suggested whether the bill should not have been filed while the legal proceedings were pending. However that may be is not so material; for if the matter set up was a defense at law, then the court below was correct in dismissing the bill.

The leading case on the side that it was not a defense at law is *Davey v. Prendergrass*, 5 Barn. & Ald. 187. The decisions in

Bullock v. Jarrold, 8 Price, 467; *United States v. Howell*, 4 Wash. C. C. 620; *Ashbee v. Pidduck*, 1 Mee. & W. 564; *Tate v. Wymond*, 7 Blackf. 240; *Carr v. Howard*, 8 Id. 190, go upon the authority of *Davey v. Prendergrass, supra*. So the doctrine turns on the authority of that case.

That was an action of debt on a surety bond conditioned for the payment in one month of whatever balance might be found due on settlement, not exceeding five hundred pounds. The second plea set up that the plaintiffs had, by parol agreement, without the privity of the defendants, given time to the principal to pay, by installments of one hundred pounds a month, the balance of one thousand and ninety-nine pounds found due on settlement, and a warrant of attorney was given accordingly. Abbott, C. J., puts the decision on purely technical grounds; thus: "The ground of my opinion in this case is that general rule of the common law which requires that the obligation created by an instrument under seal shall be discharged by force of an instrument of equal validity." In the separate opinion of Holroyd, J., it is said: "The mere giving time by parol, without consideration, is not even binding on the party himself. That [the warrant of attorney] was certainly a good consideration for the forbearance. But a mere engagement not to sue for a limited time is not a release in law of the original debt."

This decision was in 1821. In 1836 the case of *Ashbee v. Pidduck*, 1 Mee. & W. 564, often relied upon to the same effect, was made in the court of exchequer. There three persons had signed a bond, and, as in the case at bar, it did not appear anywhere on the face of the bond that two of them were sureties for the other. And it was held that a release by the obligee to the representative of one of the deceased obligors was no answer to an action against the surviving obligors.

The American editor appends a note successfully questioning this decision, on the authority both of American and English cases. Among others he cites *Grafton Bank v. Woodward*, 5 N. H. 99 [20 Am. Dec. 566]; *Gifford v. Allen*, 3 Met. 255; *Bell v. Banks*, 3 Scott N. R. 503, per Tindal, C. J. And the report shows that the ruling is not one on which the court had taken time to advise, but is given in a conversational way by Abinger, C. B., in the course of the argument at bar.

From the opinions of the judges *seriatim*, in *Davey v. Prendergrass*, 5 Barn. & Ald. 187, the following points may be deduced as held applicable to that case: 1. That it not appearing on the face of the bond that the defendants were sureties, it could not, as

against the obligee, be pleaded and shown that they were so. Accordingly, *Ashbee v. Pidduck*, 1 Mee. & W. 564. 2. That a mere engagement not to sue for a limited time, even supported by a good consideration, is not a release in law of the original debt, and therefore cannot operate to release the surety. 3. That an instrument under seal cannot be released or discharged by a parol agreement.

On the first point, the decisions are numerous and conclusive against the ruling of the English courts: *Harris v. Brooks*, 21 Pick. 195 [32 Am. Dec. 254]; *Carpenter v. King*, 9 Met. 511 [43 Am. Dec. 405]; *Bank of Steubenville v. Hoge*, 6 Ohio 17; *Grafton Bank v. Kent*, 4 N. H. 221 [17 Am. Dec. 414]; *Archer v. Douglass*, 5 Denio, 509; *Bell v. Banks*, 3 Scott N. R. 503. And to the same effect, though with obvious misgivings on the part of the court, in *Harbert v. Dumont*, 3 Ind. 346. *Carpenter v. King*, *supra*, was debt on a judgment rendered on a joint obligation, without anything on its face to show that one was merely surety for the other. After judgment against both, a parol assurance was given to the surety that it was paid. It was held that, even in the absence of fraud, the defendant, going behind the judgment, might show the collateral relations subsisting between the payors, within the knowledge of the plaintiff, and thus form a basis for the defense growing out of the subsequent acts of the plaintiff. The other authorities are directly in point to the same effect. In *Bell v. Banks*, *supra*, the reasoning of Tindal, C. J., is that the giving forbearance to the principal, without the knowledge of the surety, is a legal fraud upon the latter; and the defense growing out of this fact, coupled with the subsidiary relations of the parties, is not in contravention of the terms of the contract. In *Harbert v. Dumont*, *supra*, Harbert sued Cheek, Dumont, and Glenn, on a joint and several note. Dumont and Glenn pleaded that in consideration of the receipt of usurious interest time had been given without consent, etc., and the defense was sustained, on the authority of an English case: *Owen v. Homan*, 3 Eng. L. & Eq. 112. It may therefore be regarded as settled that even as against the payee or obligee, for the purpose of letting in any act of the plaintiff tending to affect the collateral relations of the defendants, and even when the instrument is joint and several, and wholly silent as to which is surety, the true situation of the parties as principal and surety may be shown.

2. The second proposition is equally untenable; viz., that "a mere engagement not to sue for a limited time, even sup-

ported by a good consideration, is not a release in law of the original debt, and therefore cannot operate to release the surety." The error is in assuming that to release the surety the contract must be such as to release the debt as to all the parties. This is not necessary, and is not claimed. It is not pretended that the forbearance given discharges the principal. But such indulgence, without consent, etc., is set up as an act of the plaintiff, collateral to the main contract, which entitles the surety to be exonerated.

That the forbearance is only for a limited time cannot affect the case. The suspension of the right to sue for a month, or even a day, is as effectual to release the surety as a year or two years: *Fellows v. Prentiss*, 3 Denio, 512. The existence of such a contract for delay as, if violated, would give the principal debtor a right of action will be sufficient to discharge the surety. Such contract need not deprive the creditor of the power of suing. It need not be such as the debtor could plead in bar of the suit. If it fetter and embarrass the discretion of the creditor, it changes the situation of the surety: *Owen v. Homan*, 3 Eng. L. & Eq. 112; *Turrill v. Boynton*, 23 Vt. 142; *Smith v. Day*, Id. 656.

3. The third position assumed in *Davey v. Prendergrass*, 5 Barn. & Ald. 187, and seemingly sanctioned in *Will v. Bird*, 7 Blackf. 261, and *Carr v. Howard*, 8 Id. 190, presents, at first impression, more difficulty. That an instrument under seal cannot be released or discharged by a mere parol agreement is undoubtedly the law. It is not claimed that so long as the common-law doctrine in relation to seals prevails a mere parol agreement is sufficient to discharge a writing obligatory. But it is claimed that acts may be done under a parol agreement, and in pursuance of it, which may have that effect. So that when an executed parol agreement is set up, it is not the agreement alone, but the thing done under it, that is relied upon. A parol agreement to receive depreciated bank paper in discharge of a money bond, and an actual receipt of it accordingly would be a good discharge of the specialty. Here it is not the parol agreement alone, but that and the act done under it, which is effectual.

It is upon this justly recognized distinction that the courts which have ventured to question the English decisions have proceeded. In *Carpenter v. King*, 9 Met. 511 [43 Am. Dec. 405], the supreme court of Massachusetts apply it to a judgment. In *Bank v. Leavitt*, the supreme court of Ohio apply it to a specialty. The facts in that case were these: A bond had been ex-

ecuted by two persons, the relations of whom, as principal and surety, were known to the plaintiff, though the fact of such relation did not appear on the face of the instrument. The bank accepted a confessed judgment from the principal, with an agreement for the stay of execution. By the terms of this agreement, forbearance was extended eighteen months. The plea setting up these facts came before the court on demurrer. The court say: "A surety cannot be further bound than by the terms of his undertaking. These terms cannot be changed without his consent. If any change is made to the prejudice of his rights without such consent, he may hold his obligation at an end. Any act which suspends his right to an instant pursuit of such remedy as belongs to sureties absolves him from his liability. The defense which such an act gives to the surety is one proper to be set up in a court of law. The doctrine is originally of chancery." And *Norris v. Crummey*, 2 Rand. 333, and numerous other authorities, are cited.

Bank of Steubenville v. Hoge, 6 Ohio 17, was an action on a joint and several bond against three obligors. Plea, that they had executed the specialty as sureties, with notice of that fact to the plaintiff, and that the bank had subsequently bound itself to extend the time to the principal. Replication, that the defendants were estopped by their seal, etc. But the court say: "There is no attempt here to deny the obligation of this paper, or to evade its admissions. The defense sets up a distinct and independent fact beyond the terms of the writing, not controverting any of its stipulations."

In *Archer v. Douglass*, 5 Denio, 509, the obligors of a bond given to indemnify the sheriff were permitted to show that they were sureties, and so enable them to set up in defense that the principal had been released.

We therefore conclude, on the weight of the American authorities, that the doctrine of equitable estoppel is a defense available at law as well as in equity.

Whether the facts here set up for relief in chancery would have constituted a good and complete defense at law, we do not decide. It is not before us. Nor do we give any intimation what effect we think our statutes in relation to sureties generally might have on such questions in a court of law. Nor particularly do we decide what may be the effect of the provisions of the statute in relation to the surplus revenue on the case at bar.

All we do decide is, that the matter set up, if a defense at all, was available at law. That the defendants were presumed to

know. That they were otherwise advised and believed, does not avail: *Platt v. Scott*, 6 Blackf. 389 [39 Am. Dec. 436]. They have had their day in court. That a party has mistaken his rights, and so failed to make his defense at law, does not entitle him to relief in chancery: *Rains v. Scott*, 18 Ohio, 7; *Raburn v. Shortridge*, 2 Blackf. 480; *Parker v. Morton*, 5 Id. 1, and the authorities there cited.

The decree is affirmed with costs.

SURETY, WHETHER DISCHARGED BY EXTENSION OF TIME TO PRINCIPAL: See *Burke v. Cruger*, 58 Am. Dec. 102, 104; *Smith v. Estate of Steele*, 60 Id. 276; *Devers v. Ross*, Id. 331; *Yates v. Donaldson*, 61 Id. 283, and notes to these cases.

EVIDENCE TO SHOW RELATION OF PRINCIPAL AND SURETY: See *Harris v. Brooks*, 32 Am. Dec. 254, and note; *Carpenter v. King*, 43 Id. 405, and note; *McGee v. Prouty*, Id. 409; *Lime Rock Bank v. Mallett*, 56 Id. 673.

FORBEARANCE OR DELAY TO SUIT PRINCIPAL, WHETHER DISCHARGES SURETY: See *Johnson v. Planters' Bank*, 43 Am. Dec. 480; *Pintard v. Davis*, 47 Id. 172; *King v. State Bank*, Id. 739; *Carter v. Jones*, 49 Id. 425; *Marberger v. Potts*, 55 Id. 479; *Burke v. Cruger*, 58 Id. 102; *Cook v. Southwick*, 60 Id. 181, and notes to these cases.

EQUITABLE RELIEF AGAINST JUDGMENTS AT LAW OBTAINED THROUGH FAILURE TO MAKE DEFENSE: See *Skinner v. Deming*, 54 Am. Dec. 463, and note collecting and digesting prior cases in this series; *Casey v. Gregory*, 54 Id. 581; *Warner v. Conant*, 58 Id. 178; *Pollock v. Gilbert*, 60 Id. 732.

BEARD v. DENNIS.

[6 INDIANA, 200.]

COURT OF COMMON PLACES OF INDIANA HAS JURISDICTION TO GRANT INJUNCTION against the prosecution of a trade by certain persons in a certain place in violation of a contract.

PARTNERS CANNOT ESCAPE EFFECT OF THEIR CONTRACT NOT TO CARRY ON CERTAIN TRADE, if the contract is otherwise valid, by merely taking in an additional partner.

INJUNCTION AGAINST PROSECUTION OF TRADE MAY BE GRANTED AT SUIT OF ONE ONLY OF SEVERAL PARTNERS with whom the contract was made, where an injunction simply, and not compensation or damages, is asked.

CONTRACT IN GENERAL RESTRAINT OF TRADE IS VOID.

CONTRACT IN RESTRAINT OF TRADE WILL NOT BE IMPLIED, it seems, from the mere sale of the good-will of a business.

CONTRACT IN RESTRAINT OF TRADE, WITHIN LIMITS THAT MAY BE ADJUDGED REASONABLE by the court, and not injurious to the public, is valid.

CONTRACT IN REASONABLE RESTRAINT OF TRADE MUST BE UPON CONSIDERATION, like contracts generally; but the parties may agree upon what the consideration shall be, so that it is legal; and the mere pur-

chase of a stock in trade is a sufficient consideration for the vendee's agreement to abstain from carrying on the particular trade in the place where the purchaser is to engage in it.

EFFECT WILL BE GIVEN TO STIPULATIONS IMPOSING REASONABLE RESTRAINT OF TRADE, and not to those which are unreasonable, where the stipulations in the contract are divisible, and part impose reasonable and part unreasonable restraints. *Per Perkins, J.*

INJUNCTION WILL LIE TO PREVENT VIOLATION OF CONTRACT IN REASONABLE RESTRAINT OF TRADE; and, it seems, specific performance of such contract may be decreed.

CONTRACT IN RESTRAINT OF TRADE IS UNREASONABLE AND VOID, as injurious to the public, on the ground of public policy, when the restraint is larger than is required for the necessary protection of the party with whom the contract is made.

COMPLAINT asking an injunction. The opinion states the facts.

J. B. Julian and W. P. Benton, for the appellants.

W. A. Bickle and O. P. Morton, for the appellees.

By Court, PERKINS, J. Complaint in the Wayne common pleas by Dennis against Beard and Sinex, asking an injunction. Injunction granted. Appeal to this court.

The case may be shortly stated as follows: Dennis, Mumford, and Hooker, partners, were largely engaged in the city of Richmond, Indiana, in the sale of agricultural implements. Beard and Sinex were in the same trade, in the same place. They sold out their stock on hand to Dennis & Co., and agreed not to resume the same business in the city of Richmond for the consideration, in round numbers, of three hundred and fifty dollars. This agreement was in writing. The consideration was paid. Afterwards, Dennis bought out Mumford and Hooker, and carried on the business himself. Beard and Sinex took in an additional partner by the name of Dunn, and resumed their trade in agricultural implements. Dennis filed this complaint for the purpose of having them perpetually enjoined from prosecuting that trade in the city of Richmond, and nothing more. He did not seek an account and compensation.

The appellants object that the court of common pleas had not jurisdiction of the cause. It is expressly conferred by statute: 2 R. S., p. 19, sec. 21, and p. 59, sec. 136.

They object that it is not Beard and Sinex, but Beard, Sinex, and Dunn, who are carrying on the business, and hence, that there is no violation of the agreement to discontinue trade made by Beard and Sinex.

It is too plain for argument that the latter persons cannot

escape the effect of this contract, if it is otherwise valid, by merely taking in an additional, perhaps nominal, partner.

They also object that Dennis cannot maintain this proceeding in his own name, but must, if at all, prosecute in the name of Dennis, Mumford, and Hooker.

As the complaint is simply to obtain an injunction, we think Dennis can maintain it in his name alone. The injunction is to operate for his benefit—he seems to be alone interested in its existence. But were he not, it is, when granted on his application, just as serviceable to Mumford and Hooker as though obtained on the joint application of all three of the parties, and no more detrimental to the appellants. Had the complaint sought to obtain compensation or damages, as the legal interest in the contract made the foundation of the proceeding is in Dennis, Mumford, and Hooker, it would probably have been necessary, even in this equitable proceeding, to have made them all parties, that it might bar any other suit by them for that purpose.

The remaining inquiry is, Can the remedy adopted be had upon the contract in question? Anciently the common law strongly discountenanced all contracts in restraint of trade. In one of the earliest cases of which we have an account, Year Book, 2 Hen. V., where a dyer was bound not to exercise his craft for two years, Hull, J., not only held the bond void as against the common law, but added: "By God, if the plaintiff were here, he should go to prison till he had paid a fine to the king;" *Claygate v. Batchelor*, Ow. 143; *Colgate v. Bachelor*, Cro. Eliz. 872. But views as to policy have undergone a change upon the subject. In 1711 occurred the case of *Mitchel v. Reynolds*, regarded as the leading authority in this branch of the law. It is reported in 1 P. Wms. 181, and given in the first volume of the American edition of Smith's Leading Cases, at side-page 172. Judge Parker delivered an elaborate opinion, collecting and classifying the previous cases bearing upon the subject, and coming to the conclusion that a "promise to restrain one's self from trading in a particular place, if made upon a reasonable consideration, is good; *secus*, if it be on no reasonable consideration, or to restrain a man from trading at all." Under this decision it was regarded, till the case of *Hitchcock v. Coker*, 1 Nev. & P. 796, as a question for the court in every instance to determine whether the consideration for the promise was reasonable or adequate; but the law of the case of *Mitchel v. Reynolds*, *supra*, has been subsequently modified, and, as Parke, B., states colloquially, in the argument by counsel in *Green v. Price*, 13 Mee. & W.

695, "all that doctrine about the adequacy of the consideration has been upset by *Hitchcock v. Coker*, 1 Nev. & P. 796; *Hinde v. Gray*, 1 Man. & G. 195; and the true question now is whether the contract is injurious to the public or not. If it be, it is void; if it be not, the parties may contract for what consideration they please."

Latterly cases have multiplied upon this class of contracts, and the state of the law upon it, at present, may be briefly stated thus:

1. That a contract in general restraint of trade is void; and that no contract in restraint is implied from the mere sale of the good-will of a business.

2. That a contract restraining a party from trading within limits that may by the court be adjudged reasonable, and not injurious to the public, is valid: *Avery v. Langford*, 1 Kay, 663, Eng. V. Ch. 1854. In *Ward v. Byrne*, 5 Mee. & W. 548, the doctrine was carried to the extent of holding, where a person had agreed that he would not follow or be employed in the business of a coal merchant for, etc., that he not only could not set up the business for himself, but that he could not act in it as clerk for another, nor could he act as soliciting agent: *Turner v. Evans*, 2 El. & Bl. 512; 75 Eng. Com. L. 511; see *Miller v. Elliott*, 1 Ind. 484; *Taylor v. Owen*, 2 Blackf. 301 [20 Am. Dec. 115]; *Taylor v. Moffatt*, Id. 305; *Taylor v. Moffatt et als.*, Id. 304.

3. That such contract must be, like contracts generally, upon a consideration; but that the parties may agree upon what it shall be, so that it is legal; and that the mere purchase of the stock in trade of a party is a sufficient consideration for that party's agreement to abstain from carrying on the particular trade in the place where the purchaser is to engage in it: *Green v. Price*, 13 Mee. & W. 695; *Pierce v. Woodward*, 6 Pick. 206.

4. That where the stipulations in a contract are divisible, and a part impose reasonable and a part unreasonable restraints, courts will give effect to the former, and not to the latter: *Lange v. Werk*, 2 Ohio St. 519; *Mallan v. May*, 11 Mee. & W. 653; *Chesman v. Nainby*, 2 Ld. Raym. 1456; S. C., 2 Stra. 739.

5. That remedies exist at law and in chancery. Those at law need not be specified. In chancery are: 1. Certainly, injunctions restraining violations of such agreements: *Williams v. Williams*, 2 Swanst. Ch. 253; and the numerous cases cited in a note in 3 Daniell's Ch. Pr., Perkins's ed., 1875; *Holden's Adm'r v. McMakin*, 1 Parsons's Sel. Eq. Cas. 270; and 2. Perhaps decrees for specific performance: Note to *Williams v. Williams*, *supra*.

In 1820 Lord Eldon said, in *Baxter v. Conolly*, 1 Jac. & W. 576, but it was not necessary to decide, that a court would not execute a contract for the sale of a good-will of a trade.

In 1822 Sir John Leach, vice-chancellor, decreed a specific performance of an agreement for such sale: *Boyson v. Whitehead*, 1 Sim. & St. 74.

And in 1826 Lord Gifford, master of the rolls, in *Coslake v. Till*, 1 Russ. 376, a case in which the point did not arise, put a query as to whether a court of equity would decree a specific performance of such a contract. He noticed the *dictum* of Lord Chancellor Eldon, in *Baxter v. Conolly*, *supra*, but made no reference to the express decision of Sir John Leach, above referred to. It is not our purpose to intimate any opinion on this point, but simply to note the cases bearing upon it.

Proceeding now to apply the law to the case under consideration, we find that the contract of sale was executed, the restraint coupled with it limited to the city of Richmond as to territory, but was indefinite as to time. The contract was made in June, 1853. The consideration, we have seen, was sufficient, the law gives the remedy resorted to, and the only remaining question is, Was the restraint reasonable?

In *Mallan v. May*, 11 Mee. & W. 663, the rule is laid down that "every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made is unreasonable and void, as injurious to the public, on the ground of public policy."

This rule we think correct, and tested by it, the restraint in the case before us cannot be considered as too large as to space. And in *Hitchcock v. Coker*, 1 Nev. & P. 796, and *Archer v. Marsh*, 6 Ad. & El. 959, it is decided that indefiniteness as to time alone is no objection.

Looking at the whole case, then, we think the contract under consideration reasonable and valid. Its existence rendered the partnership establishment of Dennis, Mumford, and Hooker more valuable. That value would enter into the consideration of the sale and purchase of that establishment, and entitle the purchaser to the benefit of the agreement to exclude Beard and Sinex from setting up the same business: Collyer on Part., Perkins's ed., 148. Hence, Dennis should be entitled to relief.

The judgment is affirmed with costs.

CONTRACT IN GENERAL RESTRAINT OF TRADE IS INVALID: *Pike v. Thomas*, 7 Am. Dec. 741, and note; *Alger v. Thacker*, 31 Id. 119. In *Madison etc. R. R. v. Whiteneck*, 8 Ind. 236, the principal case is cited to the

point that contracts in general restraint of trade are void at common law, as are contracts in full restraint of marriage, though partial and reasonable restraints in relation to both subjects are valid; and in *Wilcy v. Baumgardner*, 97 Id. 68, it is referred to on the point that a contract in restraint of trade is void if the restraint be unreasonable, and this question is one of law for the court to determine; and the contract will be supported or avoided on grounds of public policy.

CONTRACT IN REASONABLE RESTRAINT OF TRADE IS VALID: *Pierce v. Fuller*, 5 Am. Dec. 102; *Pike v. Thomas*, 7 Id. 741, and note; *Palmer v. Stebbins*, 15 Id. 204; *Grundy v. Edwards*, 23 Id. 409; *Bowser v. Bliss*, 43 Id. 93; *Kellogg v. Larkin*, 56 Id. 164. See the principal case cited and referred to on this point in *Duffy v. Shockey*, 11 Ind. 72; *Roller v. Ott*, 14 Kan. 616.

CONTRACT IN RESTRAINT OF TRADE TO BE UPON CONSIDERATION: See *Pierce v. Fuller*, 5 Am. Dec. 102; *Pike v. Thomas*, 7 Id. 741; and note; *Palmer v. Stebbins*, 15 Id. 204; *Kellogg v. Larkin*, 56 Id. 164.

INJUNCTION WILL LIE TO PREVENT VIOLATION OF CONTRACT IN REASONABLE RESTRAINT OF TRADE: *Sterling v. Klepeatle*, 24 Ind. 96; *McClary's Appeal*, 58 Pa. St. 54.

DILLING v. MURRAY.

[6 INDIANA, 224.]

COMPLAINT IS NOT DEMURRABLE FOR OMITTING TO SHOW THAT OBSTRUCTION OF WATER WAS UNNECESSARY to defendant in the fair and reasonable use of the stream, where it seeks to enjoin the obstruction of the flow, and it does not appear that the defendant had any use for the water, and he is not charged with the erection of a mill, but of a dam.

JUDGMENT CANNOT BE COLLATERALLY IMPEACHED by a party on the ground that false testimony was given at the trial.

EVERY RIPARIAN PROPRIETOR HAS EQUAL RIGHT TO FLOW OF WATER THROUGH HIS LAND, and no one has a right to use it to the material injury of those below him. If he diverts the stream, he must return it to its natural channel when it leaves his estate.

EVERY INJURY TO RIPARIAN PROPRIETOR BELOW WILL NOT CONFER RIGHT OF ACTION. It is necessary to take into consideration the capacity of the stream, the adaptation of the machinery to it, and all the attendant circumstances; and when all these are properly considered, if the proprietor below is materially injured, when considered in relation to the facts of the particular case, he is entitled to redress.

PROCEEDINGS to enjoin the defendant from obstructing the flow of the water of a stream to the plaintiff's mill. The facts are stated in the opinion.

J. Bariden, for the appellant.

J. S. Newman, J. P. Siddall, and J. B. Julian, for the appellee.

By Court, Gookins, J. This was a proceeding instituted by Murray against Dilling, in the Wayne circuit court, and trans-

ferred to the common pleas, the object of which was to enjoin Dilling from obstructing the flow of the water of a stream to the plaintiff's mill by the manner of erecting and maintaining a dam above it.

The complaint states that for fourteen years the plaintiff has been the owner of a mill and manufactory propelled by water on his own land; that in the spring of 1850 the defendant erected a dam across the stream above the plaintiff's land, by which the water was diverted from its natural channel, and the flow of it to his mill prevented; that he brought an action against the defendant for said injury, to which he pleaded not guilty, and in August, 1851, he recovered a judgment against the defendant for the damages he had then sustained; that the defendant keeps up his dam, and still prevents the flow of the water; and that his mill, which was worth three thousand dollars, is thus rendered valueless.

The defendant demurred to the complaint, because it did not show that the obstruction of the water was unnecessary to the defendant in the fair and reasonable use of the stream. The demurrer was properly overruled. It does not appear from the complaint that the defendant had any use for the water. He is not charged with the erection of a mill, but a dam.

The answer admits the erection of the plaintiff's mill, but avers that for ten years previous thereto the defendant had had in full operation a mill just above it on the same stream, and had been accustomed to use all the water of the stream; that since the erection of the plaintiff's mill he has so used the water as to preserve the plaintiff's rights as far as in his power. He admits the recovery of the judgment, but seeks to impeach it for testimony given on the trial, which he says was false. He states that his mill is on his own land; and that he always intends to use the water with every possible regard to the plaintiff's rights. He denies having diverted the stream, but alleges that he uses the water for his mill, and then permits it to flow freely down the channel; and particularly since said trial he has not allowed the water to be retained when he was not using it himself. He claims that having erected his works long before the plaintiff's, he has a paramount right to the use of the water, doing him no unnecessary harm.

The plaintiff demurred to so much of the answer as sought to impeach the judgment, and the demurrer was correctly sustained. The reply denies the affirmative matter set up in the answer.

There was a trial by the court, which resulted in a judgment for the plaintiff, and an order that the defendant should take down and remove a dam across the stream mentioned in the complaint, called the new dam, so as not to obstruct the waters of the stream; and the defendant was further ordered so to regulate and use the water at his works as not to detain the same longer than three hours at one time, except in the night, and that he commence letting it out early in the morning, and was enjoined from using the water otherwise.

It appears from the evidence taken in the cause that the defendant was the owner of an oil-mill, the machinery of which was propelled by water taken from the stream, by means of a dam and race, all upon his own land. How long his mill had been erected does not appear. About fourteen or fifteen years ago, but since the erection of the defendant's mill, the plaintiff erected a woolen-factory and saw-mill, about half or three quarters of a mile below the defendant's, supplied by water in the same manner, and situated upon his own land. The capacity of the stream was not such as to furnish a constant supply, except in time of high water; and at low and ordinary stages the water was used by gathering heads. The plaintiff seems to have had usually a sufficiency of water at his mill until 1850, when the defendant erected a saw-mill, on the same race, below his oil-mill, and constructed a new dam, below and near the old one. Overshot wheels had been previously used in the plaintiff's and defendant's mills, but the wheel used in the saw-mill was of the kind called flutter-wheels, and required about three or four times as much water as the former kind. Since the erection of the new dam and saw-mill, the plaintiff has not been able to run his establishment more than half as much as before.

The rule of law which governs cases of this kind is well established. Every riparian proprietor has an equal right to the flow of the water through his land, and no one has a right to use it to the material injury of those below him. He has no property in the water itself; but only a right to use it as it flows along. If he diverts the stream, he must return it to its natural channel when it leaves his estate. This rule is laid down by Chancellor Kent, 3 Kent's Com. 489, and is the clear result of all the authorities. But it is not every injury to a proprietor below that will confer a right of action, or justify an order to remove the obstruction. In every detention of water for the purposes of machinery, there is some loss by evaporation and

absorption; and, especially in a stream like this, there would necessarily be some irregularity in the flow of the water. Pothier lays down the rule that the owner of the upper stream must not raise the water by dams so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. The rule thus stated is too strong for the present case; the capacity of the stream being such that the water, if used at all, cannot be allowed to maintain a continuous and regular flow.

This question was much considered in the case of *Palmer v. Mulligan*, 8 Cai. 307 [2 Am. Dec. 270], where a majority of the court, Kent and Thompson, JJ., dissenting, held that although the erection of a dam above made it so much more difficult for the owner of a mill below to bring logs to his mill as to require an additional hand for every twenty-five logs, and though the rubbish from the upper mill was an inconvenience to the proprietor of the lower to the amount of two hundred and fifty dollars a year, yet these were injuries for which the proprietor below had no remedy.

The difficulty is not so much in the rule as in the application of it; in which it is necessary to take into consideration the capacity of the stream, the adaptation of machinery to it, and all the attendant circumstances; and when all these are properly considered, if the proprietor below is materially injured, that is, materially when considered in relation to the facts of the particular case, he is entitled to redress. In the case above referred to, the mills were upon the Hudson river, which is a large stream; and even there two of the judges thought the plaintiff ought to recover. An injury to the same extent to a mill situated upon a small stream would doubtless have entitled the plaintiff to an action.

In the case before us, the proof shows that the dam which was ordered to be removed was an obstruction to the stream; and that if so used as to gather a head of any considerable use to the saw-mill, it would occasion an unreasonable detention of the water. It was properly ordered to be removed. Although there is much conflicting testimony in regard to the capacity of the stream, there is very little, if any, in regard to the quantity of water required to propel the saw-mill wheel. The proof on that point tended strongly to show that the wheel was unsuited to the stream. Upon the whole case, we think the judgment ought to be affirmed.

The judgment is affirmed with costs.

JUDGMENT, WHETHER MAY BE COLLATERALLY IMPRACHED BY PARTY: See *Young v. Lorain*, 52 Am. Dec. 463; *Borden v. State*, 54 Id. 217; *White v. Merritt*, 57 Id. 527; *Schultz v. Schultz*, 60 Id. 335. The principal case is cited in *Wiley v. Pasey*, 61 Ind. 459, to the point that a judgment of a court of general jurisdiction, having jurisdiction of the subject-matter and person, is not void, and cannot be attacked collaterally for fraud or irregularity in the proceedings in which it was obtained; so in *Cline v. Crump*, 11 Id. 126, it is cited to the effect that in a suit upon judgments taken by confession for a *bona fide* debt, the defendant cannot set up, as fraud in obtaining the judgments, that the plaintiff had failed to perform his part of the contract which was entered into by him as an inducement to such confession. See also the principal case cited in *Meredith v. Lackey*, 14 Ind. 531; S. C., 16 Id. 4.

RIPARIAN PROPRIETOR'S RIGHT TO NATURAL AND UNINTERRUPTED FLOW OF STREAM: See *Newhall v. Ireson*, 54 Am. Dec. 590, and note collecting prior cases in this series; *Elliott v. Fitchburg R. R.*, 57 Id. 85; *Olney v. Fenner*, Id. 711; *Stein v. Burden*, 60 Id. 453; *Blood v. Nashua etc. R. R.*, 61 Id. 444. The principal case was cited in *Dumont v. Kellogg*, 29 Mich. 425, to the point that each riparian proprietor is allowed a reasonable use of the water.

REASONABleness OF USE OF WATER BY RIPARIAN PROPRIETOR, ON WHAT DEPENDS: See *Elliott v. Fitchburg R. R.*, 57 Am. Dec. 85; *Therber v. Morris*, 61 Id. 468, and notes to these cases.

WOOD v. COHEN.

[*6 INDIANA, 455.*]

DEMAND FOR RETURN OF CHATTEL MUST BE MADE BY OWNER OF BONA FIDE PURCHASER, even from the wrongful taker, before he is liable to an action to recover the possession, although the one who wrongfully took the chattel is liable without demand.

DEFENDANT IS COMPETENT WITNESS FOR HIS CO-DEFENDANT, under the Indiana statute, where, in an action to recover possession of a chattel alleged to have been wrongfully taken and detained, their interests are antagonistic to the extent that one of them is not liable at all events in the absence of a demand, he being a *bona fide* purchaser.

ACTION to recover possession of a horse. The question as to the competency of defendant Wood to testify in behalf of his co-defendant, Cohen, arose under the statute which provided that "a party may be examined on behalf of his co-plaintiff or co-defendant, as to any matter in which he is not jointly interested, or liable with such co-plaintiff or co-defendant, and as to which a separate and not a joint judgment shall be rendered:" 2 R. S. 1852, p. 97.

T. H. Test and J. M. Wilson, for the appellants.

O. P. Morton and M. Wilson, for the appellees.

By Court, PERKINS, J. Action to recover the possession of a horse. The complaint alleges that the horse was tortiously

taken by one of the defendants, and is wrongfully detained by both. The defendants severally answered, Wood denying his wrongful taking and detention, and Cohen his wrongful detention of the horse; and both asserting it to be the property of Cohen; defendant Wood stating that he sold the horse in good faith to Cohen. The plaintiff replied, denying the truth of the answers.

On the trial, Cohen offered his co-defendant, Wood, as a witness in his behalf. The plaintiff objected to the competency of Wood as a witness, on the ground of his joint interest with Cohen in the suit, Wood admitting that he had sold the horse to Cohen, and would be liable over to him if the plaintiff succeeded; but the court permitted the witness to be sworn.

The judgment in this case, had it been in favor of the plaintiff for the recovery of the horse, would not necessarily have been joint against the defendants.

If Wood wrongfully took the horse from the plaintiff, he would have been liable without a demand for its return having been made; whereas if his co-defendant, Cohen, was a *bona fide* purchaser of the horse, even from the wrongful taker, he would not have been liable in the absence of such a demand: *Barrett v. Warren*, 3 Hill (N. Y.), 348; *Pringle v. Phillips*, 5 Sandf. 157. And, according to the late English authorities, he would not, under such circumstances, have been liable at all. See the cases cited and commented upon in *Pringle v. Phillips, supra*. But we do not mean to intimate a sanction of this doctrine. It might have been important, therefore, for Cohen to show that though Wood wrongfully took the horse, and was liable in the suit, yet that he was a *bona fide* purchaser from him, and hence not liable, at all events, in the absence of a demand; and so far his interest and that of his co-defendant would have been antagonistic, and not joint in the statutory sense of the word. We think Wood was rightly admitted as a witness: *City of New York v. Price*, 4 Sandf. 616; *Beal v. Finch*, 11 N. Y. 128, a case in which the whole subject under the New York code is discussed.

To what extent a co-defendant, when made a witness, as in this case, is to be permitted to testify, is another question, and one not now raised.

The judgment below was for the defendants, and it is contended that it should have been for the plaintiff. It is insisted that the evidence showed that a fraudulent sale of the horse had been made by the defendant Wood to the plaintiff, and that such sale deprived him of title and the right to repossess himself

of the article sold. The assumption of law is correct: *Mandlove v. Burton*, 1 Ind. 39; but it is not clear that any sale was made, and the question was for the jury upon the evidence.

The judgment is affirmed with costs.

DEMAND MUST BE MADE BY OWNER OF CHATTEL OF BONA FIDE PURCHASER from another before an action to recover possession can be maintained: *Conner v. Comstock*, 17 Ind. 94; *Torian v. McClure*, 83 Id. 312; *Roberts v. Norris*, 67 Id. 391; or before an action for conversion is maintainable: *Sherry v. Picken*, 10 Id. 377. The principal case was cited to these points.

PARTY JOINTLY INTERESTED WAS NOT COMPETENT WITNESS IN INDIANA. If a defendant might be liable jointly with his co-defendant, he is an incompetent witness: *Hall v. Nash*, 11 Ind. 37. A co-defendant, however, may be called as a witness, but cannot be examined touching any matter in which he is alike interested with the other defendants: *King v. State*, 15 Id. 67. Where a judgment is rendered against two defendants before a justice of the peace, and but one of the defendants appeals, the defendant not appealing is no party to the suit in the appellate court, and may be a witness in that court for the defendant prosecuting the appeal: *Goodhue v. Palmer*, 13 Id. 458. But the court cannot say that a person was erroneously excluded as a witness where he was a party to the record, and might be subjected to a joint judgment as to part of the subject-matter of the suit: *Dearmond v. Dearmond*, 10 Id. 193. In this connection, see sec. 496, Ind. R. S. 1881.

BEEBE v. STATE.

[6 INDIANA, 501.]

RIGHT TO MANUFACTURE AND SELL INTOXICATING LIQUORS IS PROTECTED BY INDIANA CONSTITUTION, and an act of the legislature prohibiting it is unconstitutional and void.

LIQUOR IS PROPERTY, and as such can only be taken for public purposes and after full compensation.

LEGISLATURE CANNOT ENLARGE ITS POWER OVER PROPERTY OR PURSUITS by declaring them nuisances.

WHETHER GIVEN KINDS OF PROPERTY OR CLASSES OF PURSUITS ARE NUISANCES is a question for the judiciary.

HABEAS CORPUS. The facts are stated in the opinion.

J. Morrison, W. T. Otto, J. W. Chapman, D. Wallace, E. Coburn, and J. S. Hester, for the appellant.

D. McDonald, L. Barbour, A. G. Porter, H. O. Newcomb, J. Coburn, and N. B. Taylor, for the state.

By Court, PERKINS, J. Roderick Beebe sued out from the Marion common pleas a writ of *habeas corpus* to obtain deliverance from imprisonment in the county jail. The sheriff, being jailer, made return to the writ that he held said Beebe in cus-

tody by virtue of *mittimus* to him directed by the mayor of Indianapolis, reciting that said Beebe had been convicted and fined under the provisions of the act to prohibit the manufacture and sale, except, etc., of intoxicating liquors, passed by the legislature of 1855, approved on the sixteenth of February, and published in all the counties of the state on the seventeenth of May, and appointed to take effect on the twelfth of June of that year, and had not paid or replevied the fines, etc. The alleged offenses were shown to have been committed after the twelfth of June.

Upon this return, Beebe moved the court to discharge him from custody, but the court overruled the motion. The ground of the motion, as stated, was that the liquor act of 1855 was unconstitutional, and therefore void; that a conviction under it was consequently invalid; and that as the facts of the case appeared upon the face of the return, it showed that Beebe was illegally restrained of his liberty.

Counsel on both sides concede in argument that the record presents the question of the validity of, at least, what is alleged to be the prohibitory portion of said liquor act; and that question will, therefore, without inquiry upon the point, be considered. We approach it with all the caution and solicitude its nature is calculated to inspire, and that intention of careful investigation its importance demands, feeling that the consequences of the principles we are about to assert will not be confined in their operation to this case alone.

Preliminary to the discussion of the main questions involved, however, the course of argument of counsel requires that we should say a word by way of fairly setting forth the duty this court has to perform in the premises, viz., the simply declaring the constitutionality or unconstitutionality of the law, with an assignment of the reasons upon which the declaration is based.

It will not be for us to inquire whether it be a good or a bad law in the abstract, unless the fact, as it might turn out to be, should become of some consequence in determining a doubtful point on the main question. It not unfrequently becomes the duty of courts to enforce injudicious acts of the legislature because they are constitutional, and to strike down such as, at first view, appear to be judicious, because in conflict with the constitution.

With these remarks, we proceed to the examination of the feature of the liquor act of 1855 now more especially presented to the court. We shall not spend time upon the inquiry whether,

on the day it came into force, there were existing unsold manufactured products in the hands of the distillers and brewers upon which it operated, rendering them valueless, or whether such products had all been disposed of between the passage and taking effect of the law. We shall direct our investigation to the character of its operation upon the future manufacture, sale, and consumption of intoxicating liquors. And,

1. Is it prohibitory? The first section enacts that "no person shall manufacture, keep for sale, or sell" any "ale, porter, malt beer, lager-beer, cider, wine," etc. The second section permits the manufacture and sale of cider and wine, under certain restrictions, by any and all of the citizens of the state.

Other sections permit the manufacture of whisky, ale, etc., by persons licensed for the purpose, so far as may be necessary to supply whatever demand certain persons called county agents may make upon them. These agents are authorized to sell for medicinal, mechanical, chemical, and sacramental uses, and no other, and may procure their liquors of the licensed manufacturers, but are not required to do so, and as matter of fact do not, but obtain them in most cases from abroad. They constitute no part of the people engaged in business on their own account, but are appointed under the law by county commissioners; supplied with funds from the county treasury; paid a compensation for their services by the county; sell at prices fixed for them; and make the profits and losses of the business for the public treasury, and not for themselves. We say they are furnished with public funds. They are so in all cases; for where they in the first instance invest their own, it is by way of loan to the county at a fixed rate of interest, and the amount is refunded by the county with interest. These selling agents then are, and for convenience may be denominated, government agents; for it is all one in principle whether the government creates and furnishes them with funds through the medium of the counties, or appoints them directly by statute and supplies them with funds from the state treasury. To express, then, the substance of the main provisions of the law, they may be paraphrased thus: 1. Be it enacted, that the trade and business of manufacturing whisky, ale, porter, and beer, now and heretofore carried on in this state, shall cease; except that any person specially licensed to manufacture for medicine, etc., for the government, may do so, and sell to that extent, if the government should conclude to buy of such person, but not otherwise; 2. That no person in this state shall sell any whisky, beer,

ale, or porter, unless the sale be to an agent of the government, or by such agent for medicine, etc.; and as no person is allowed to provide himself with those articles by manufacture or purchase, to use as a beverage, it results, 3. That no person in this state shall drink any whisky, beer, ale, or porter, as a beverage, and in no instance except as a medicine.

It thus appears that the law absolutely forbids the people of the state to manufacture and sell whisky, ale, porter, and beer, for use as a beverage, or at all, except for the government, to be sold by it for medicine, etc.; and it prohibits absolutely the use of those articles by the people as a beverage.

The exception as to the admission of foreign liquors under the constitution and laws of the United States will not be noticed, for the reason that they are admitted simply because it is conceded that they cannot be prohibited, and not in accordance with the spirit and policy of the state statute; and which foreign liquors may or may not be obtained here, according to the contingent action of other powers; and for the further reason that their admission, if claimed to be a part of the object and policy of the state liquor law, or in order to supply the people with liquor as a beverage, renders the law doubly objectionable; for while, according to such a view, the law designs to permit the use of liquors as a beverage, it prohibits the people from manufacturing for their own use. It is as if the law were that the people might eat bread, but should not raise the grain and grind it in flour wherewith to make it. It would be an act to prohibit the people from themselves producing, and to compel them to purchase from abroad what they might need to eat and drink. It would involve the principle of an act to annihilate the state, by starving the people constituting it to death; and such legislation would hardly comport, we think, with a constitution established to promote the welfare and prosperity of the people. We assume it as established, then, that the liquor act in question is absolutely prohibitory of the manufacture, sale, and use, as a beverage, by the people of this state, of whisky, ale, porter, and beer.

The opinion has indeed been advanced, that the manufacture for sale out of the state is not prohibited, but it has not the substance of a shadow; and the morality of that law which prohibits the distribution of pauperism and crime, disease and death, at home, but permits them to be scattered amongst our neighbors, is not to be envied.

And we may as well remark here as anywhere, that if the

manufacture and sale of these articles are proper to be carried on in the state for any purpose, it is not competent for the government to take the business from the people and monopolize it. The government cannot turn druggist and become the sole dealer in medicines in the state; and why? Because the business was, at and before the organization of the government, and is properly at all times, a private pursuit of the people, as much so as the manufacture and sale of brooms, tobacco, clothes, and the dealing in tea, coffee, and rice, and the raising of potatoes; and the government was organized to protect the people in such pursuits from the depredations of powerful and lawless individuals, the barons of the middle ages, whom they were too weak to resist, single-handed, by force; and for the government now to seize upon those pursuits is subversive of the very object for which it was created, and is inconsistent with the right of private property in and pursuits by the citizen. "A government is guilty of an invasion upon the faculties of industry possessed by individuals when it appropriates to itself a particular branch of industry, the business of exchange and brokerage for example; or when it sells the exclusive privilege of conducting it:" Say's Political Economy, p. 134, note.

There are undertakings of a public character, such as the making of public highways, providing a uniform currency, etc., that a single individual has not power to accomplish, and which government must therefore prosecute; but they are not the ordinary pursuits of the private citizen. These, certainly, as the general rule, and we are not now prepared to name an exception, the government cannot engage in. This is all we shall here say upon this point. Time and space forbid that we should elaborate all that arise in the case. The question now presents itself—

2. Could the legislature of this state enact the prohibitory liquor law under consideration?

Few, if any, judicial decisions will be found to aid us in investigating this question, as no such law, in a country possessed of a judiciary and a constitution limiting the legislative power, has, till of late, been enacted. Hence it has not often, if at all, as to this point, passed under judicial consideration.

A number of European writers on natural, public, and civil law are cited by counsel on behalf of the state to show the extent of legislative power; but those writers, respectable, able, and instructive upon some subjects as they are admitted to be, are not authority here upon this point. They are dangerous,

indeed utterly blind, guides to follow in searching for the landmarks of legislative power in our free and limited government, for they had in view, when writing, governments as existing when and where they wrote, under which they lived and had been educated, and which had no written constitution limiting their powers; governments, the theory of which was that they were paternal in character; that all power was in them by divine right, and they, hence, absolute; that the people of a country had no rights except what the government of that country graciously saw fit to confer upon them; and that it was its duty, like as a father towards his children, to command whatever it deemed expedient for the public good, without first, in any manner, consulting that public, or recognizing in its members any individual rights.

Indeed, the discovery of the great doctrine of rights in the people as against the government had not been made when the writers above referred to lived.

Such governments as those described could adopt the maxim quoted by counsel, that the safety of the people is the supreme law, and act upon it; and being severally the sole judges of what their safety in the countries governed respectively required, could prescribe what the people should eat and drink, what political, moral, and religious creeds they should believe in, and punish heresy by burning at the stake—all for the public good. Even in Great Britain, esteemed to have the most liberal constitution on the eastern continent, Magna Charta is not of sufficient potency to restrain the action of parliament, as their judiciary does not, as a settled rule, bring laws to the test of its provisions. Laws are there overthrown only occasionally by judicial construction. Such a thing, indeed, as deciding a law or royal decree unconstitutional in an absolute government is unknown. Hence the oppression of the people.

And it must be admitted that efforts have not been wanting to ingraft upon the governments of this country something of the same principle. It is, in fact, the "general welfare" doctrine, under which it was claimed by latitudinarians that the congress of the United States could enact alien and sedition laws, national banks, etc., for the public good. It is the same principle upon which some of the states enacted laws compelling men to attend on Sunday a Protestant church, and pay to support it. The proposition was laid down in them in regard to religion, as by counsel for the state here in regard to prohibition, that it was for the public morals and good of families and

prevention of crime that men should observe the ordinances of the gospel, and occupy seats in Protestant churches, instead of other places, on the sabbath; and hence the state compelled them by law to do so. But the doctrine has been fraught with oppression, and has not produced, permanently, promised results. Limitations have been inserted in constitutions upon the legislative power to prevent this oppression. And over the people of this state hangs the shield of written constitutions, which are the supreme law, which our legislators are sworn to support, which grant a restricted legislative power within which the legislators must limit their action for the public welfare, and whose barriers they cannot overleap under any pretext of supposed safety of the people; for along with our written constitutions we have a judiciary, created by them a co-ordinate department of the government, whose duty it is, as the appropriate means of securing to the people safety from legislative aggression, to annul all legislative action without the pale of those instruments. This duty of the judicial department in this country was demonstrated by Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch, 137, and has since been recognized as settled American law. Indeed, it is a great distinguishing feature of a limited government. The maxim above quoted, therefore, as applied to legislative power, is here without meaning.

Nor does it prove the power of the state legislature to enact the law in question, to show that the supreme court of the United States has decided that it cannot declare such a state law inoperative, for that court can only declare void such state laws as conflict with the restrictions imposed upon state power by the constitution of the United States; and if in that constitution the states are not restrained from passing laws in violation of the natural rights of the citizen, the supreme court of the United States cannot act upon such laws when passed, because they do not fall within its jurisdiction. But it does not follow that because the constitution of the United States does not prohibit state legislation infringing the natural rights of the citizen, such legislation is valid. The constitution of the United States may not, but that of the state may, inhibit it; and so, indeed, according to many eminent judges, may principles of natural justice, independently of all constitutional restraint. This doctrine has been asserted here. In *Andrews v. Russell*, 7 Blackf. 474, Judge Dewey says: "We have said that the only provisions in the federal or state constitution, restrictive of the power of the legislature," etc., "are," etc. "There are car-

tain absolute rights, and the right of property is among them, which in all free governments must of necessity be protected from legislative interference, irrespective of constitutional checks and guards." Should we find, however, in the course of this investigation, that the constitution of our free states does in fact sufficiently protect natural rights from legislative interference, as it surely does or it is grievously defective, it will not become necessary for us to inquire whether, in any event, it might be proper to fall back upon the doctrine above so unhesitatingly asserted.

But before proceeding farther, it is proper we should say that eminent judges of the supreme court of the United States have asserted that a state, so far as not restrained by the constitution of the United States, has the same "unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation:" *New York v. Miln*, 11 Pet. 102; *License Cases*, 5 How. 504; and that we admit the doctrine for the purposes of this case, in the application which they gave it, viz., that the state in its sovereign capacity possesses this power; not that the legislature, under our state constitution, possesses it. The doctrine asserted is, that the state in its sovereign capacity possesses such power, which by a constitution she is capable of conferring, if she pleases, upon her legislature; not that she has conferred it. No judge of the supreme court of the United States, in the cases cited, assumed to analyze the constitution of this state, and say that it conferred upon or left with the legislature the unlimited powers of a despotism, or what power it did grant or withhold.

We admit further, at this point, that it has also been declared that the taxing power of a state is unlimited, and hence may be exercised in such a manner as practically to prohibit particular pursuits upon which it may be made too heavily to fall; for example, the selling of dry goods or liquors. But an enactment of such description has none of the features of a formal prohibitory law, for it is based upon the assumption that the taxed pursuit is to exist and not cease; its continuance is, indeed, invited by the act, as its cessation would defeat the very object of the enactment, being revenue; and prohibition, if it resulted, would not be found in the law, but in the accident that nobody happened to be able, or to feel disposed at the time, to pay the tax for the sake of the business. This would be accidental, and might be temporary.

The question then recurs, the one now to be decided, Does

our constitution prohibit the passage of such an act as that involved in the present suit?

That instrument contains a grant of legislative power, and it contains express limitations upon that grant. There are also, probably, implied limitations. But if the present case can be decided upon the express limitations, it will not be necessary for us to discuss the questions of the extent of power conferred upon the legislature by the general grant, and of implied limitations.

We proceed to examine the express limitations. The first section of the first article declares that "all men are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." Under our constitution, then, we all have some rights that have not been surrendered, which are consequently reserved, and which government cannot deprive us of unless we shall first forfeit them by our crimes; and to secure to us the enjoyment of those rights is the great aim and end of the constitution itself.

It thus appears conceded that rights existed anterior to the constitution; that we did not derive them from it, but established it to secure to us the enjoyment of them. And it here becomes important to ascertain with some degree of precision what these reserved natural rights are. To do this we must have recourse to the common law, as the section was undoubtedly inserted in the constitution with reference to it. Counsel, in the argument of this cause, on the part of the state, it is true, deny the existence of any such rights in Indiana. Our answer is, The constitution above quoted has settled the point here; and a legislature, acting under that instrument, is estopped by its solemn declaration to deny the existence of the natural rights there asserted. That assertion, while it remains, is binding within the territory of Indiana. When the people of the state shall become satisfied that it is founded in mistake, they can meet in their sovereign capacity, strike it from their organic law, and insert the contrary, that they are without natural rights, and at the mercy of the legislature. We may properly here observe, that added to these restrictive provisions of the bill of rights in the old constitution was the following:

"Sec. 24. To guard against any encroachment on the rights herein retained, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate."

The new constitution does not contain this section; but that

constitution did not intend to weaken the restraints designed for the protection of the people, and the section quoted was omitted because the expressly declared reservations in the bill of rights were necessarily taken from the absolute power of the legislature without such declaratory section. And it should be here remarked that it is not said these rights are reserved to be used without restraint. Each individual being equally entitled to their exercise, the right of each operates as a check upon the right of every other, compelling mutual regard for those of each, and subjecting each to punishment by the judiciary, under legislative regulations, for violating the equal right of every other, and giving the injured, in all cases, redress by law. And further provisions of the constitution, which must be construed together with that quoted, confer powers, such as taxation, etc., on the legislature relative to these rights. Such powers may be exercised.

We proceed, then, to inquire what these reserved rights are; and to ascertain, we go, as we have said, to the common law. Chancellor Kent, following Blackstone, says: "The absolute [or natural] rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property:" 2 Kent's Com. 1; not some property, or one kind of property, but, at least, what the society organizing government recognizes as property. How much does this right embrace? How far does it extend? It undoubtedly extends to the right of pursuing the trades of manufacturing, buying and selling, and to the practice of using. These acts are but means of acquiring and enjoying, and are absolutely necessary and incidental to them. What, we may ask, is the right of property worth, stripped of the right of producing and using?

The right of property is equally invaded by obstructing the free employment of the means of production as by violently depriving the proprietor of the product of his land: Say's Political Economy, 133.

In *Arrowsmith v. Burlingim*, 4 McLean, 497, it is said: "A freeman may buy and sell at his pleasure. This right is not of society, but from nature. He never gave it up. It would be amusing to see a man hunting through our law-books for authority to buy or sell, or make a bargain." To the same effect, Lord Coke, in 2 Inst., c. 29, p. 47; Rutherford's Institutes, 20.

So far, then, we find that the people have expressly reserved the right of property, and its enjoyment, in forming their con-

stitution, from the unlimited power of the legislature; and further to guard the right, have ordained that it shall not be taken from them without just compensation, nor be injured without a remedy therefor by due course of law, that is, a legal trial in court, nor be subject to unreasonable seizure, etc.: Sec. 11, art. 1, and secs. 12 and 21 of the same article. They have, however, as we have said, authorized the legislature, by article 10, section 1, to tax, by a "uniform and equal rate," the property of the people of the state, and impliedly, as we have seen, to take it, by paying for it, for the public use. Now, these restraints upon the legislative power were inserted in the constitution for some purpose; what was it? And they have some meaning; what is it? Wherein do they furnish security to the citizen? This court must determine. Their object was, beyond all question, to protect the people from aggression on the part of the government; and under them the legislature cannot take the property, the liquors of a single individual, if they are property, when not needed for public purposes, and then only upon compensation.

But if the legislature cannot deprive a single citizen of his property, can it, by a general law, deprive all the citizens of theirs? If that body could not enact that A. B. should no longer cultivate his farm, could it by a general law enact that all the farmers of the state should cease to cultivate theirs? Further, these restrictions in the constitution apply alike to all property; they make no distinction. Is liquor, then, property? Is a distillery property? They are so, unquestionably, in Indiana. At the time of the adoption of our present constitution there were fifty distilleries and breweries in the state, which turned out annually manufactured products to the value of half a million of dollars, used mostly by our people as a beverage. Liquor had always been an article of use and traffic in the state, and always been taxed as property. With these facts existing, the subject was repeatedly brought before the constitutional convention, and that body refused to make any change in the relation of the government towards this species of articles. We are safe in saying, then, that under this constitution the government could not take, for public use, from a single individual, a single barrel of liquor without paying for it. Can it, then, by a general law, annihilate the entire property in liquors in the state?

There are other provisions of the constitution that have some bearing upon this point, as evincing regard by that instrument

for individual property and the right of traffic. Section 22 of article 1 declares that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted."

Now, suppose the property of a debtor to consist, as the fact might be, entirely of liquor. Of what avail is this constitutional provision if the government can step in at will and confiscate that property?

Again: section 24 of the same article provides that no law shall ever be passed impairing the obligation of a contract. Yet here is a law which, by prohibiting an entire pursuit, and rendering valueless all the property involved in it, must, of necessity almost, impair all executory contracts that have grown out of that pursuit, and render them utterly incapable of fulfillment.

The position, however, is taken on the part of the state that it is competent for the legislature, whenever it shall deem proper, to declare the existence of any property and pursuit deemed injurious to the public nuisances, and to destroy and prohibit them as such; and that such action of the legislature is not subject to be reviewed by the courts. We deny this position. We deny that the legislature can enlarge its power over property or pursuits by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. Whatever it has a right by the constitution to prohibit or confiscate, it may thus deal with, without first declaring the matter a nuisance; and whatever it has not a right by the constitution to prohibit and confiscate, it cannot thus deal with, even though it first declare it a nuisance. It cannot do by indirection what it cannot do directly. For example, the constitution of the United States prohibited the abolition by congress of the foreign slave-trade till 1808: Const. U. S., art. 1, sec. 9. Now, prior to that date congress could not have, by direct enactment, prohibited the slave-trade for want of power. Could she, then, have declared the trade a nuisance, and then abolished the nuisance? Had she the power to do that?

Again: article 1, section 9, of the constitution of Indiana declares that "no law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print freely on any subject whatever; but for the abuse of that right every person shall be responsible."

Under this provision, all will admit that if the legislature of

this state should assume that the press had become so licentious as to require its suppression, and should enact a law accordingly, that law would be void, and this court bound to pronounce it so. But could the legislature evade the constitutional provision by first declaring the press throughout the state a nuisance, and then enacting that it should cease to exist? It surely could not, or the constitutional provision is worthless.

Now, as the legislature cannot declare the press and printing business nuisances, because protected by the constitution, so it cannot declare property and the acquisition and use of it nuisances for precisely the same reason.

But the section above quoted of the constitution itself points out the remedy for the evil of abuse. And it indicates the general remedy in all these cases. It is the responsibility, that is, the liability to suit and punishment and loss by forfeiture of the particular press made the instrument of abuse, of "every person" who shall be guilty of committing such evil. And the questions of the guilt of the individual and abuse of the property, in every case, are to be decided by the judiciary and the punishment inflicted by that department. Any other mode of adjudging guilt and inflicting punishment is but mob or lynch law.

But to return. The questions whether a law is in conflict with the constitution or not, and whether a thing is a nuisance or not, and hence liable to forfeiture, are judicial, and to be finally determined by the courts alone. Such is the organic law of the state, and it is, hence, needless to discuss its propriety here: See *Doe v. Douglass*, 8 Blackf. 10. Why it has been so ordained in the constitution, whether because of the supposed superior capacity of the judicial department to judge of such questions or for other reasons, it is not particularly important to inquire. We may in this connection, however, quote with propriety from *Young v. State Bank*, 4 Ind. 301 [58 Am. Dec. 630], as follows: "Now, the constitution [article 3 of that of 1851], above quoted, says the legislature shall not perform a judicial act. The granting of a new trial [in a suit in court], we have seen, is a judicial act. Therefore the legislature cannot grant a new trial. And it is a power that should not be possessed by the legislature in its legislative capacity; because, in that capacity, it would not be governed in its action by legal rules. And to permit it to dispose of judicial questions in that capacity would be in the highest degree dangerous to the rights of the individual members of the community."

It is, indeed, most strenuously contended in this case by counsel that the propriety and validity of the liquor act under consideration were questions to be determined by the discretion of the legislature, and that the determination of that body is not subject to review in this tribunal; and some early cases in the supreme court of the United States, particularly *McCullough v. State of Maryland*, 4 Wheat. 316, are cited as sustaining the doctrine.

We shall enter into no argument upon the theory or first principles of the question. We shall treat it as one of authority. Indeed, in the case in Wheaton, *supra*, the distinguished chief justice, in the opening of his opinion, uses language that might justify a review of the law before us by this court. He says that "a doubtful question, in which the great principles of liberty are not concerned," might perhaps be put to rest by the repeated action of the legislature; implying, certainly, that had the question in that case been one that was conceived to concern those great principles, it might have been decided by a different rule. Such is the question now before this court for decision. It does concern the great principles of liberty. It is to determine whether one single dollar's worth of property in this state, and the right to pursue a single employment, whether, indeed, a single iota of personal liberty remains to the people, secure from the invasion of a despotic legislature—for if it can strike down one of the recognized pursuits of the citizens, it can all. But whatever may be the rule asserted in the early cases, that of *Bronson v. Kinsie*, 1 How. 311, so late as 1843, determines, beyond all doubt, that the courts will review and decide upon the exercise of legislative discretion, so far as to determine whether, in the given case, the constitution has been violated. It involved and decided precisely the question so earnestly argued in this case, and which we are now considering. In that case, the legislature of Illinois enacted a law regulating the replevy of judgments and the sale of property on execution. There was no provision in the constitution expressly prohibiting legislation upon legal remedies, and hence it was claimed that under the general grant of legislative power, the right to so legislate passed to the legislature in its discretion. But the constitution of the United States did forbid the passage of a law impairing the obligation of a contract; and the supreme court decided that they would look into the manner in which the legislature had exercised its discretion in a matter where there was no express restriction, to see that it had not, in that exercise,

violated some express constitutional provision. Judge McLean dissented, contending for the right of legislative discretion; but the same court, in subsequent cases, reaffirmed the doctrine of *Bronson v. Kinsie, supra*, and it is now the settled law: *McCracken v. Hayward*, 2 How. 608; *Gantly's Lessee v. Ewing*, 3 Id. 707; *Curran v. Arkansas*, 15 Id. 304. This court unanimously adopted the same rule in *Thomas v. Board of Commissioners of Clay County*, 5 Ind. 4; and in *Maize v. State*, 4 Id. 342. And can it be that legislative discretion shall be controlled in the matter of violating a contract, and not where it annihilates a great pursuit involving millions of dollars and innumerable contracts?

Another position is taken by counsel who last argued this cause for the state, and insisted upon with great confidence; it is this: that the legislature has unlimited power over the commerce of the state, and can, hence, prohibit altogether the sale of liquors, or direct the sole purposes for which they may be sold. It is argued in this way: Congress has power to regulate foreign commerce, commerce between the states and with the Indian tribes; and under this power she may prohibit all commerce in the named cases, confiscate property, etc. The legislature of the state has power, under the general grant, to regulate domestic commerce; hence, like congress, it may prohibit, confiscate, etc.

The cases are not parallel, and the reasoning is unsound. The grant to congress of power to regulate commerce is, since 1808, unlimited. There is no bill of rights in the constitution of the United States; in short, no restriction, unless by implication, upon the power of congress to regulate trade in the specified instances. Hence, congress, do what she may, cannot be shown, on this subject, to have violated any restriction in the federal constitution under which that body acts, because it contains none.

Now, how is it with the legislature and constitution of this state? Our state constitution contains, as we have seen, certain restrictions upon the legislative power, certain sections declaring rights in the citizen as against the government, and these restrictions operate just as potently upon the power of the legislature to regulate commerce as to do anything else; prevent that body just as effectually from infringing the reserved rights by assumed regulations of commerce as by any direct enactment. To illustrate: the constitution declares that every citizen shall be secure in the right to worship God according to the dictates

of his own conscience. Now, the great body of religious denominations in this state conscientiously believe they are bound to celebrate one of the ordinances of the gospel by the use of bread and wine. But wine is an article of commerce, and its purchase is a commercial transaction; therefore, upon the argument, the legislature has power to prohibit its use, or declare the purposes for which it may be sold and purchased. It may, therefore, declare that it shall not be sold or purchased for sacramental use, thus, in effect, overthrowing the constitutional provision that the citizen shall have the right to worship according to his conscience, and abolishing the general practice of the christian ordinances in the state. This the legislature cannot do. It must regulate within the restrictions of the constitution. So the purchase of nails and lumber is commerce. Can the legislature say they may be purchased to build barns with, but not churches or dwellings?

Again: the constitution says, as we have quoted above, that the right of printing—the freedom of the press—shall remain inviolate in this state. But the purchase of paper to print on, ink to print with, and type, is commerce. And can the legislature prohibit, or declare the uses for which such articles may be purchased, saying they may be purchased for the purpose of printing advertising handbills, but not to print books or newspapers? Surely such a law would as effectually violate the constitution as a direct enactment that no books or newspapers should be printed in the state. We might continue these illustrations, but it cannot be necessary.

The legislature has no more right to violate the constitution under the guise of a regulation of commerce than by a statute literally in conflict with it. And if, as in the above instanced cases, the express provisions of the constitution secure to the citizen his property and its reasonable use, the legislature cannot take away the right by any legerdemain of legislation. And whenever the legislature does so invade the constitutional right of the citizens, they are not bound to submit to the outrage for two years, till the assembling of another legislature, nor to resort to the terrible remedy of revolution, but may quietly and peacefully invoke the action of the judiciary to annul the act of legislative usurpation.

And here we are called upon to mark the line which bounds the power of the legislature on the one hand and the right of the citizen on the other; to say what the legislature may and may not do in all cases. We answer that we have already pointed out

the line, so far as to show that in this case the legislature has overstepped it and invaded the constitutional right of the citizen. This is all we can now be required to do. The judicial mind must place each case, as it arises, upon the proper side of the boundary admitted to exist. This will be its duty, and no more. Such has been the practice.

We have said that we should treat the question of the right of the court to judge of the grounds of a law alleged to infringe constitutional restrictions as one of authority. We will, however, add the remark that the court knows, as matter of general knowledge, and is capable of judicially asserting the fact, that the use of beer, etc., as a beverage, is not necessarily hurtful, any more than the use of lemonade or ice-cream: See 2 Burke's Works, Dearb. lib. ed., p. 190, in "Thoughts on Scarcity." It is the abuse, and not the use, of all these beverages that is hurtful. But the legislature enacted the law in question upon the assumption that the manufacture and sale of beer, etc., were necessarily destructive to community; and in acting upon that assumption, in our own judgment, has unwarrantably invaded the right to private property, and its use as a beverage and article of traffic.

What harm, we ask, does the mere manufacture or sale or temperate use of beer do to any one? And the manufacturer or seller does not necessarily know what use is to be made by the purchaser of the article. It may be a proper one; and if an improper one, it is not the fault of the manufacturer or seller, but it is thus appropriated by the voluntary act of another person, and by his own wrong. And will the general principle be asserted that to prevent the abuse of useful things, government shall assume the dispensation of them to all the citizens—put all under guardianship? Fire-arms and gunpowder are not manufactured and sold to shoot innocent persons with, but are often so misapplied. Axes are not made and sold to break heads with, but are often used for that purpose in the hands of murderers. Bread is not made to make gluttons with, but is perverted to that use. Razors are not made to cut throats with, but are applied in that way by the suicide. The Almighty did not create fists to knock people down with, but they are often put to that use, and still he permits men to be born with fists. Yet who, for all this, has ever contended that the manufacture and sale of these articles should be prohibited as being nuisances, or be monopolized by the government? We repeat, the manufacture and sale and use of liquors are not necessarily hurtful, and

this the court has a right to judicially inquire into and act upon in deciding upon the validity of the law in question—in deciding, as was done in *Bronson v. Kinsie*, 1 How. 311, whether it is an indirect invasion of a right secured to the citizen by the constitution. This question the court must decide; and it must, therefore, in some manner satisfy its judgment and conscience upon it: *Tanner v. Trustees of Village of Albion*, 5 Hill, 121, and cases cited.

The act is not one to prohibit or punish drunkenness, or any abuse of the use of liquors; were it, a different question might be presented—one, however, on which we here intimate no opinion, as it is not before us. When a case shall arise calling for a decision as to the extent of the power of the legislature to regulate without prohibiting, we shall be prepared to make that decision according to the best of our judgment.

The restrictions which we have examined upon the legislative power of the state were inserted in the constitution to protect the minority from the oppression of the majority, and all from the usurpation of the legislature, the members of which, under our plurality system of elections, may be returned by a minority of the people. They should, therefore, be faithfully maintained. They are the main safeguards to the persons and property of the state. They will be maintained, in so far as depends upon us, notwithstanding the intimation at the argument, that whoever interposed an obstruction to the free course of this law was to be swept away by an overwhelming torrent. We shall be deterred by no such ill-timed threat from what we believe to be the discharge of a solemn duty.

It is easy to see that when the people are smarting under losses from depreciated bank paper, a feeling might be aroused that would, under our plurality system, return a majority to the legislature which would declare all banks a nuisance, confiscate their paper and the buildings from which it issued. So with railroads, when repeated wholesale murders are perpetrated by some of them. And in Great Britain and France we have examples of the confiscation of the property of the churches even, which here the same constitution that protects the dealer in beer would render safe from invasion by the legislative power.

In our opinion, for the reasons above given, the liquor act of 1855 is void. We express no opinion upon any single provision of the act, as in the view we have taken of its general scope it is unnecessary.

DAVISON, J. I concur in the foregoing opinion of Judge Perkins.

The judgment is reversed, and the prisoner discharged.

STUART, J., thought the conviction for selling was right, but was in favor of a reversal on the ground that the record and return were defective. He was of the opinion that the subject, necessity, policy, and expediency of a law were matters of legislation, and did not belong to the judiciary; and that it was competent for the legislature to restrain the use and sale of intoxicating liquor, but that so much of the act under consideration as related to the manufacture and agency was unconstitutional and void.

GOKINS, J., believed that the judgment ought to be affirmed, and held that it was competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish accordingly, and that with the policy or expediency of the measure the courts had nothing to do.

VALIDITY OF STATUTES REGULATING OR PROHIBITING SALE OF INTOXICATING LIQUORS: See *Commonwealth v. Kimball*, 35 Am. Dec. 326, and note; *Preston v. Drew*, 54 Id. 639; *State v. Gurney*, 58 Id. 782. The principal case was followed in *Hollenbaugh v. State*, 11 Ind. 557, and the court regarded as settled the question as to the validity of an ordinance declaring the sale of intoxicating liquors a nuisance, forbidding such sale, and prescribing punishment therefor; and to the same effect, see *Vonderweit v. Town of Cesterville*, 15 Id. 448. In *Thomasson v. State*, Id. 456, it was held that the Indiana law of 1850 regulating the sale of intoxicating liquors fell within the legislative powers conceded in the principal case; and according to the opinion of the majority of the judges therein an information which does not aver that liquor was not sold for medicinal, etc., purposes is bad: *Kniser v. State*, 9 Id. 543; but the principal case does not annul the Indiana liquor law of 1850; *Ingersoll v. State*, 11 Id. 465. The language of Perkins, J., to the effect that "the legislature enacted the law in question upon the assumption that the manufacture and sale of beer, etc., were necessarily destructive to the community," was quoted in *Harrison v. Lockhart*, 25 Id. 117.

THE PRINCIPAL CASE WAS ALSO CITED OR REFERRED TO AS FOLLOWS: in *Madison et al. R. R. v. Whiteneck*, 8 Ind. 222, to the point that the judiciary cannot run a race of opinions upon points of right, reason, and expediency with the law-making power; see also Id. 238, *per* Gookins, J., dissenting; in *City of Lafayette v. Jenners*, 10 Id. 80, to the point that legislative acts constitute "persuasive arguments," still they are, in a sense, but arguments, and do not absolve the court from the obligation to think for itself in testing them by the paramount law of the land to which they must conform; in *Griffin's Ex'r v. Cunningham*, 20 Gratt. 53, to the effect that legislative action cannot be made to retroact on past controversies, and reverse decisions which the courts in the exercise of their undoubted authority have made; in *Noel v. Ewing*, 9 Ind. 46, to the point that the exercise of the power in Indiana to change at pleasure the relative rights of husband and wife is a matter of legislative discretion, which the courts cannot rightfully control; in *City of Aurora v. West*, Id. 81, to the point that while it is not unconstitutional for a city to aid in the construction of a highway, promoting the convenience of all the citizens by facilitating the introduction among them of fuel, bread, etc., the pursuits of engaging in trade and traffic in these articles belong to the individual citizens and private corporations; and in *State v. Adamson*, 14 Id. 208,

to the effect that in it Gookins, J., held that the liquor act of 1855 embraced but one subject, and matters properly connected therewith. See also, on this last proposition, *Hingle v. State*, 24 Id. 31; *State v. Young*, 47 Id. 161, *per Buskirk and Donney, JJ.*, dissenting.

HANNA v. PHELPS.

[7 INDIANA, 21.]

SPECIFIC LIEN ON CHATTEL FOR REMUNERATION EXISTS IN FAVOR OF PERSON TO WHOM DELIVERED, as a general rule, if it receives from his labor and skill an increased value, provided there is nothing in the contract inconsistent with the existence of the lien; and such lien exists equally, whether there be an agreement to pay a stipulated price for the labor and skill, or an implied contract to pay a reasonable price.

BAILEE'S LIEN FOR LABOR AND SKILL BESTOWED UPON CHATTEL IS WAIVED by an unqualified refusal to deliver the chattel to the bailor, without placing the refusal on the ground of the lien.

ASSUMPSIT. The opinion states the facts.

H. P. Biddle, for the appellants.

D. D. Pratt, and D. M. Cox, for the appellee.

By Court, DAVISON, J. *Assumpsit.* The complaint is that Phelps, the plaintiff below, on the first day of December, 1849, delivered to Hanna & Burr, who were then engaged in the business of rendering lard from hogs' heads by steam and barreling the lard so rendered for hire, at the town of Wabash, three thousand hogs' heads, which they agreed to render into lard, and barrel the same for the plaintiff, within a reasonable time, etc., for which service he agreed to pay them a reasonable compensation, etc. It is averred that the defendants have failed to perform the agreement on their part, etc.

Pleas: 1. The general issue; 2. Performance; 3. That the plaintiff was indebted to the defendants two hundred dollars for rendering lard and barreling the same, etc., which sum exceeds in amount their indebtedness to him, etc. Issues being made on these pleas, the cause was tried by the court, who found for the plaintiff. New trial refused, and judgment. The court, upon the defendants' motion, gave a written statement of the facts on which its finding was based, and of the conclusions of law arising on the facts. That statement is as follows:

1. The plaintiff delivered to the defendants, as bailees, two thousand one hundred hogs' heads, out of which lard was to be rendered by them for him, which heads each produced four pounds of lard, making eight thousand four hundred pounds.

2. The defendants delivered to the plaintiff at Jackson's warehouse, in the town of Wabash, in twenty-three barrels, five thousand one hundred and sixty-two pounds of lard, leaving unaccounted for and undelivered three thousand two hundred and thirty-eight pounds. The lard was worth five cents per pound, making for the last-named quantity in money one hundred and sixty-one dollars and ninety cents. As a compensation for rendering said lard, the defendants were entitled to eighty-four dollars, leaving a balance due the plaintiff of seventy-seven dollars and ninety cents.

3. The plaintiff, after the delivery of the twenty-three barrels, and before the commencement of this suit, notified the defendants to deliver to him all the lard made from said heads; but they declined to deliver any more lard. He did not at any time before this suit either pay or tender to them any sum for their services, nor was any demand made by them for such services. When the twenty-three barrels were delivered, the lard was subject to their claim for rendering the same, amounting to fifty-one dollars and sixty-three cents, which amount was never paid to them. The delivery at Jackson's warehouse was with his consent.

These were all the facts proved in the cause, and upon them the court, as a conclusion of law, decided that no payment or tender for services in rendering the lard was necessary before suit.

Was this decision correct? Generally speaking, if a chattel delivered to a party receive from his labor and skill an increased value, he has a specific lien upon it for his remuneration, provided there is nothing in the contract inconsistent with the existence of the lien. And such lien exists equally, whether there be an agreement to pay a stipulated price for "the labor and skill" or an implied contract to pay a reasonable price. The present is one of the cases in which liens usually exist in favor of the party who has bestowed services on property delivered to him for the purpose. And unless the record discloses facts or circumstances sufficient to produce the inference that the defendants waived their lien before the institution of this suit, they were not compelled to give up the property when the plaintiff demanded it, without the payment or tender of a reasonable compensation for rendering and barreling the lard. If the defendants, at the time of the demand, had refused, on the ground of their lien, to part with the property, the law of this

case would be clearly in their favor; but here the plaintiff's demand was answered by an absolute refusal to deliver any more lard. We are therefore to inquire whether that refusal waived the lien.

Upon this subject the authorities are not uniform. In England the rule seems to be that a person having a lien upon goods does not waive it by the mere fact of his omitting to state that he claims them in that right, when they are demanded. But if a different ground of retention than that of the lien be assumed, the lien ceases to exist: *White v. Gainer*, 9 Moore, 41; S. C., 2 Bing. 23; S. C., 1 Car. & P. 324; *Boardman v. Sill*, 1 Camp. 410, note. It is however contended that the refusal of the defendants, to have shielded them, should have been qualified by their claim of a lien. There is authority in support of that position. *Dows v. Morewood*, 10 Barb. 183, was replevin for twenty-one cans of oil. In that case it was held "that the defendant having, upon demand made, refused to deliver the oil to the plaintiff without setting up any lien thereon, waived his right to set up a lien afterwards for freight, etc.; that he could not be allowed to deny the plaintiff's title, before suit brought, and afterwards defeat a recovery by setting up a lien."

We are inclined to adopt this rule of decision. An unqualified refusal, upon a demand duly made, is evidence of a conversion, because it involves a denial of any title whatever in the person who makes the demand. In the case before us the defendants "declined to deliver any more lard." This was in effect an assumption that they had in their possession no more belonging to the plaintiff. At least, he had a right to infer from their answer to his demand that they would deliver to him no more lard unless compelled to do so by action at law. And having thus assumed a position relative to the property inconsistent with his title, he had, further, the right to infer that a tender to the defendants for their services would be unavailing. We are of opinion that the facts proved are sufficient to sustain the judgment.

There is a point made as to the jurisdiction of the court. This case was tried by the honorable Thomas S. Stanfield, judge of another circuit, at a special term held in June, 1853; and it is contended that all the steps required by law to authorize such special term have not been taken: 2 R. S., p. 5, sec. 8. We have heretofore decided that the above special term was held

in conformity with the statute just cited: *Murphy v. Barlow*, 5 Ind. 230.

The judgment must be affirmed.

The judgment is affirmed, with five per cent damages and costs.

WAIVER OF LIEN BY REFUSAL TO DELIVER PROPERTY.—The cases on this question do not seem to be numerous, and among them more or less conflict exists. The rule may be laid down, however, that a person who has a lien on goods, papers, and articles of personal property generally, waives it by a general refusal on demand to deliver the articles, accompanied by a claim of title in himself, or by a claim to retain them on other grounds distinct from his lien: 1 Addison on Cont. 421; Edwards on Bail., sec. 448; *Boardman v. Sill*, 1 Camp. 410, note; *Dirks v. Richards*, 5 Scott N. R. 534; S. C., 4 Man. & G. 574; Car. & M. 626; *Weeks v. Goode*, 6 C. B., N. S., 367; *Cannet v. Spanton*, 8 Scott N. R. 714; S. C., 7 Man. & G. 903; *Holbrook v. Wright*, 24 Wend. 169; S. C., 35 Am. Dec. 607; *Rogers v. Weir*, 34 N. Y. 463, 471; *Beverett v. Saltus*, 15 Wend. 474; *Judah v. Kemp*, 2 Johns. Cas. 411; *Leigh v. Mobile etc. R. R.*, 58 Ala. 165; *Picquet v. McKay*, 2 Blackf. 465; *Bean v. Bolton*, 3 Phila. 87. Thus in the early case of *Boardman v. Sill*, *supra*, a case which has been generally followed in England and in this country, an action of trover was brought for some brandy which lay in the defendant's cellar, and which, when demanded, he refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant, and it was contended that the latter had a lien on the brandy therefor, and that until this was tendered, trover would not lie; but Lord Ellenborough held that as the brandy had been detained on a different ground, and as no demand of rent had been made, the defendant must be taken to have waived his lien if he had one. And again, in *Dirks v. Richards*, *supra*, detinue was brought for a picture which had been intrusted by the plaintiff to one Bye for sale. Bye deposited it with the defendant, an auctioneer, and when the plaintiff demanded it, the defendant refused to deliver it until a certain debt due to him from Bye was discharged. Held, the setting up of an inconsistent claim was clearly a waiver of the lien on the picture for warehouse rent. Where trover was brought by the assignees of a bankrupt against the defendant, a dyer and miller, for certain cloths, it appeared that on demand by the assignees for the cloths, the defendant refused to give them up, saying that "he might as well give up every transaction of his life;" held, that this was no waiver of his lien for work done, since the words simply intimated a claim therefor, and not a right to keep the goods as his own: *White v. Gainer*, 9 Moore, 41; S. C., 2 Bing. 23; 1 Car. & P. 324. If a right to detain the article is claimed in respect of two separate sums, and the bailee or other lienholder has a lien only as to one of such sums, the claim as to the other sum, it is held, is no waiver of the lien: *Scarf v. Morgan*, 4 Mee. & W. 270; *Green v. Shewell*, cited Id. 277; 1 Addison on Cont. 421; *Cross on Liens*, 46. Thus in *Scarf v. Morgan*, *supra*, trover was brought for a mare which had been sent by the plaintiff to the defendant, to be covered by a stallion. A demand for the mare had been made, but the defendant refused to deliver her, claiming a lien, not only for the charge on that occasion, but for a general balance due to him on another account, and it was held that the defendant was entitled to a specific lien on the mare, and that the claim made by the defendant to retain her for the general balance was no waiver of the lien. But where

replevin was brought for a steamboat boiler, upon which the defendants had done labor and work, it was shown that the latter refused to deliver it until they were paid the balance of a general account, but without making any special demand for repairs, or their specific lien therefor, it was held that the lien would be waived unless some special mention or suggestion was made of it at the time of the demand, to apprise the owner that the goods were detained: *Thatcher v. Harlan*, 2 Houst. 178; and see *Knight v. Harrison*, cited 4 Mee. & W. 272. The cases, however, differ as to whether the lien is waived by a general refusal, omitting to specify any ground for detention. *Everitt v. Coffin*, 6 Wend. 603, 608; *Buckley v. Handy*, 2 Miles, 449, seem to support the negative or this proposition; and see 1 Addison on Cont. 421; while *Dows v. Morewood*, 10 Barb. 183, *Spence v. McMillan*, 10 Ala. 583, and the principal case maintain the affirmative. The court in *Buckley v. Handy*, *supra*, making the observation that "if the plaintiffs had demanded the iron of the defendant, and he had claimed the right to retain it, not as deposited in pledge, but on some other and distinct ground, the defendant could not set up his lien afterwards." The American editor in a note to *Weeks v. Goode*, 6 C. B., N. S., 367, 370, says: "Perhaps the cases on this subject may be reconciled by holding that where there is an absolute and unqualified refusal to deliver, coupled with circumstances which show an assumption of ownership on the part of the defendant, and a right of lien is concealed from the other party, this will amount to a conversion as respects him."

BAILOR HAS LIEN ON CHATTEL FOR WORK AND LABOR THEREON giving additional value thereto: See *McIntyre v. Carver*, 37 Am. Dec. 519; *Grinnell v. Cook*, 38 Id. 663, and notes to these cases. So a pork-packer has a lien on the pork packed for his charges in slaughtering the hogs, packing the pork, and manufacturing the lard: *East v. Ferguson*, 59 Ind. 172; *Shaw v. Ferguson*, 78 Id. 554, both citing the principal case to this effect.

THE PRINCIPAL CASE WAS CITED in *Alexander v. Mount*, 10 Ind. 162, to the point that generally a bailee cannot be sued until after demand, unless he has wrongfully converted the thing bailed; and in *Hina Ins. Co. v. Skryer*, 85 Id. 368, to the point that the doctrine that an insurance company, by putting its refusal to pay the loss upon a definite ground different from a want of preliminary proofs or of defect in their form and substance, waives the right to insist upon the failure to make such proof as a defense to an action upon their policy, is in harmony with the principle that a party who places his refusal upon one ground cannot after action brought change it to another and different one. See also the principal case distinguished in *Hill v. Hesterick*, 17 Id. 518.

SPOONER v. DUNN.

[7 INDIANA, 81.]

RESULT REACHED BY LOWER COURT ON WEIGHT OF EVIDENCE WILL NOT BE DISTURBED in the supreme court.

PROMISE IS ORIGINAL UNDERTAKING, AND NOT WITHIN STATUTE OF FRAUDS, where a specific lien or substantial benefit is surrendered upon the express promise of a third person to pay a debt.

ACTION upon a promise to pay the debts of others. The facts are stated in the opinion.

J. Ryman, for the appellants.

E. Dumont, and O. B. Trbet, for the appellee.

By Court, GOODRIDGE, J. This action was brought by Strange S. Dunn against George H. Dunn, in his life-time, upon the promise of the latter to pay certain debts of Coll and McGroty, made under the following circumstances: The plaintiff had obtained judgments before the mayor of the city of Lawrenceburgh against Coll and McGroty, who were subcontractors for work on a railroad of which the defendant was president. Having levied his executions upon property sufficient to satisfy them, the plaintiff, with the defendants in the executions and the officer, went to the office of the railroad company, where the defendant verbally promised the plaintiff that if he would release his levy and return the executions he would pay the debts or would see them paid, the witness could not remember which, at the next estimate; whereupon the plaintiff released his levy and caused the executions to be returned, and after the next estimate brought his action on this promise. There was a trial by the court and judgment for the plaintiff.

The appellants insist that the promise by the defendant was made officially, on behalf of the railroad company; and that the company, if anybody, is liable upon it. They also rely upon the statute of frauds.

It appears from the evidence that at the time the promise was made the defendant stated that a considerable amount of money would be coming to Coll and McGroty at the next estimate, which would be made in a few days; that if their property was taken from them they could not go on with their work, etc. It would be a fair inference from this testimony that it was the understanding of the parties that the money was to come from the company to satisfy these demands. But no authority was shown authorizing the president to contract on ~~behalf~~ of the company, and there was also evidence tending to show that it was the personal undertaking of the defendant. The court of common pleas having weighed this evidence and found for the plaintiff, the result is not to be disturbed.

Upon the question of the statute of frauds, we have been referred by the appellants to several authorities which are supposed to support their position; and if we take what has been said by the judges, we shall have no difficulty in holding this promise within the statute. Of that character are the hypothetical cases put by Holt. C. J., in the case of *Watkins v. Perkins*, 1

Ld. Raym. 224. In *Kirkham v. Marter*, 2 Barn. & Ald. 613, the promise was to pay the plaintiff if he would not sue a third person, who had overdriven a horse causing its death; and in *Fish v. Hutchinson*, 2 Wils. 94, the consideration of a collateral promise was that the plaintiff would stay his proceedings in an action against a third person. These promises were held to be within the statute. Whether these cases can be reconciled with later authorities upon a similar state of facts, we shall not stop to inquire. There is a distinct class of cases which clearly establish the rule that where a specific lien or substantial benefit is surrendered, upon the express promise of a third person to pay a debt, it is an original undertaking and not within the statute: *Pullin v. Stokes*, 2 H. Black. 312; *Williams v. Leper*, 3 Burr. 1886; *Slingerland v. Morse*, 7 Johns. 462; *Farley v. Cleveland*, 4 Cow. 432 [15 Am. Dec. 387]. The principle is recognized in *Hackleman v. Miller*, 4 Blackf. 322.

In this case the plaintiff gave up his lien and returned his executions upon the defendant's promise to pay the amount of them. It was an original undertaking upon a new consideration, and not within the statute.

The judgment is affirmed, with five per cent damages and costs, to be levied *de bonis testatoris*.

PROMISE IS ORIGINAL UNDERTAKING, AND NOT WITHIN STATUTE OF FRAUDS, where a specific lien or substantial benefit is surrendered upon the express promise of a third person to pay a debt: *Crawford v. King*, 54 Ind. 12; *Spooner v. Shearer*, 7 Id. 136; *Spooner v. Dawson*, Id. 236; *Luark v. Malone*, 34 Id. 445, 446. So the promise of the mortgagee of a chattel to pay for repairs of the mortgaged property, made for the mortgagor by a mechanic, in consideration of which the mechanic relinquishes his lien on the property for the repairs made by him, is not within the statute of frauds, and may be enforced though verbal: *Conradi v. Sullivan*, 45 Id. 181. Such original agreements are not within the statute: *Anderson v. Spence*, 72 Id. 316; see also *Fisher v. Wilmoth*, 68 Id. 451. The principal case has been cited or followed on the foregoing points. See further, on this question, *Durham v. Arledge*, 47 Am. Dec. 544.

CONKLIN v. SMITH.

[7 INDIANA, 107.]

PURCHASER AT SHERIFF'S SALE MUST PAY OR TENDER PURCHASE MONEY WITHIN REASONABLE TIME in order to acquire title.

PURCHASER AT SHERIFF'S SALE IS ESTOPPED FROM SETTING UP HIS CLAIM by taking a mortgage on the land, he not having paid or tendered to the sheriff the purchase money and received a deed.

ACTION FOR MONEY HAD AND RECEIVED WILL NOT LIE TO RECOVER RENT paid by a tenant to one who did not acquire title under his bid at a sheriff's sale of the land, or was estopped from setting it up.

ACTION for money had and received. The opinion states the facts.

J. Rariden, for the appellant.

J. S. Newman and J. P. Siddall, for the appellee.

By Court, STUART, J. This cause was before the court at the May term, 1852, and is reported in 3 Ind. 284. Since then the declaration has been amended, adding a count for money had and received.

It seems that one Harvey was the tenant of Smith. Conklin had once purchased the demised land at sheriff's sale, but had wholly failed to pay his bid and perfect his title. No money passed, and no sheriff's deed was ever made. In fact, Conklin had formerly abandoned his position as purchaser, by loaning money to Smith, and taking from him a mortgage on the very land sold on execution. After Harvey went into possession as the tenant of Smith, with the consent of Conklin, the latter undertook to revive his claim under the sheriff's sale. Both Smith and Conklin claimed the rent from Harvey. He finally paid it to Conklin. To recover it as money had and received to the use of Smith, this action is brought.

It is very clear that Conklin derived no title by his purchase on execution. To entitle a purchaser to relief even in equity, it must appear that he had either paid or tendered the purchase money in a reasonable time: *Benton v. Shreeve*, 4 Ind. 66.

By accepting the mortgage from Smith, Conklin acknowledged his title, and was thus estopped from setting up any claim anterior to the mortgage: *Douglass v. Scott*, 5 Ohio, 194. Similar to the case at bar is that where a creditor, having a right to set aside a conveyance as fraudulent, treats with the grantee as to the subject-matter of the conveyance, recognizing it as valid. He is estopped from afterwards disputing its validity: *Rennick v. Bank of Chillicothe*, 8 Id. 529; *Fitch v. Baldwin*, 17 Johns. 161.

On either hypothesis, then, whether he did or did not derive title by his bid at sheriff's sale, Conklin had no right to the rent. The money paid him by Harvey, the tenant, was due to Smith.

No doubt the latter could, notwithstanding the payment to Conklin, have still enforced his claim for rent against Harvey.

But had he the right to consider the money paid to Conklin

as so much had and received for his use, and claim it as such? It is feared there is no privity of contract between the parties. It is true that in the decisions of other states, as well as in the elementary writers, there is abundance of authority to sustain this action. But it is believed that the doctrine uniformly held by this court has been the other way: *Salmon v. Brown*, 6 Blackf. 347; *Farlow v. Kemp*, 7 Id. 544. The opinion in the latter case, drawn up with great care and ability by Judge Sullivan, has been repeatedly followed since: *Britzell v. Fryberger*, 2 Ind. 176.

We adhere to these decisions, though it may seem a great hardship in this particular case. In amending their declaration, counsel were, no doubt, misled by a too hasty view of the language of Judge Blackford in *Conklin v. Smith*, 3 Ind. 284, when the case was first in this court. It is thus expressed: "There was evidence tending to prove that certain rent due to Smith, the plaintiff, from a tenant who had occupied certain real estate of Smith's, had been improperly received from the tenant by Conklin, the defendant. But if it be admitted that Smith had a legal claim against Conklin for the money received by Conklin, it cannot be recovered in this action for money paid. The proper form of action in such case would be for money had and received."

This language is not an authority for the action now before us. It covertly imports a doubt whether Smith had any legal claim whatever against Conklin.

In accordance with the settled doctrine of this court, the judgment must be reversed.

The judgment is reversed with costs, cause remanded, etc.

DUTY OF PURCHASER AT SHERIFF'S SALE TO PAY BID WITHIN REASONABLE TIME: *Hardesty v. Wilson*, 41 Am. Dec. 439.

THE PRINCIPAL CASE IS CITED in *Bird v. Lanier*, 7 Ind. 618, to the point that the doctrine of the supreme court of Indiana has been that at law a promise by one to another for the benefit of a third party could not be enforced by the latter.

SPEER v. SPEER.

[? INDIANA, 178.]

CONTENTS OF DEED CANNOT BE PROVED if the deed has been surrendered and destroyed by the party's own voluntary act or consent, and such surrender and destruction of an unrecorded deed may have the effect of divesting his title by estopping him from proving the contents.

DESTRUCTION OF JOINT DEED BY ONE GRANTEE WITHOUT OTHER'S CONSENT does not have the effect to divest the title which vested in them jointly.

Action to recover the possession of certain lands. The facts appear in the opinion.

B. W. Wilson, S. A. Bonner, J. S. Scobey, and W. Cumback, for the appellant.

J. Ryman, for the appellee.

By Court, PERKINS, J. Action to recover possession of the undivided half of certain real estate.

The defendant denied each and every allegation in the complaint, and he answered that the plaintiff and the defendant purchased the land jointly, each agreeing to pay one half of the purchase money, and both agreeing further that if the plaintiff failed to pay the one half, the defendant might pay the whole, and become the sole owner of the land; that the plaintiff did fail to pay; that the defendant paid the whole, and by consent of plaintiff took possession and received the deed for the whole of the land, etc. The court sustained a demurrer to this answer, the cause was tried upon the replications to the general denials, and a judgment rendered that the plaintiff recover, etc.

On the trial the plaintiff proved the joint purchase by himself and the defendant of the land, the payment for it in the presence of both purchasers, and the reception of a joint deed from the seller by them, which was left with defendant. He further proved that the defendant, in his absence, subsequently surrendered that deed to be canceled, and procured another purporting to convey the whole of the land to himself; that the defendant was in the exclusive possession, claiming the entire interest, etc. This was substantially all the evidence in the cause.

It is unimportant to inquire into the correctness of the ruling of the court below upon the demurrer, as the whole question upon the title necessarily came up on the trial upon the general denial of the plaintiff's right. The plaintiff, to make out his case, was compelled to prove title. Of this his deed would be the best evidence. But this deed had been destroyed, and he was driven to prove its contents. This he would not be permitted to do if the deed had been surrendered and destroyed by his own voluntary act or consent: *Wilson v. Cassidy*, 2 Ind. 562, and authority cited. Hence he was compelled to and did enter upon a course of evidence that covered the whole ground assumed in the answer, and enabled the defendant to prove the facts set up in it if he could. He attempted and failed, and the case rests upon the first deed of conveyance. That joint deed

from the seller of the land to the plaintiff and defendant vested in them jointly the title, and the destruction of it by one of the grantees without the consent of the other did not have the effect to divest the joint title. Hence, the plaintiff had a right to recover. The voluntary surrender and destruction of an unrecorded deed may have the effect of divesting the title of the grantee by estopping him from proving the contents of the destroyed instrument, and thus disabling him to establish title in himself.

The judgment is affirmed, with one per cent damages and costs.

SECONDARY EVIDENCE INADMISSIBLE OF UNRECORDED WRITING VOLUNTARILY DESTROYED: *Blade v. Noland*, 27 Am. Dec. 126. See the principal case cited on this point in *Sutton v. Jervis*, 31 Ind. 287; and in *Thompson v. Thompson*, 9 Id. 328, as regards evidence of a lost deed which has been recorded. In respect to the admissibility of lost, destroyed, or absent writings in general, see *Fletcher v. Jackson*, 58 Am. Dec. 98, and cases in note; *Hunt v. Roylance*, 59 Id. 140. In order to lay a proper foundation for secondary evidence, it must be shown that the original writing was lost, or destroyed by time, mistake, or accident, or was in the hands of the adverse party, who had due notice to produce it on the trial: *Anderson Bridge Co. v. Applegate*, 13 Ind. 339, citing the principal case to this point.

THE PRINCIPAL CASE IS ALSO CITED in *Lamaco v. Brinkmeyer*, 12 Ind. 351, to the point that where a defense is well pleaded, under which the defendants could have proved the matter stated in a rejected paragraph, the rejection could not be assigned for error; and see citations to substantially the same effect in *Reed v. Helm*, 15 Id. 429; *Pittsburgh etc. R. R. Van v. Houten*. 48 Id. 96.

IRWIN v. IVERS.

[7 INDIANA, 308.]

PAROL EVIDENCE IS INADMISSIBLE TO ANNUL OR SUBSTANTIALLY VARY WRITTEN AGREEMENT, except for fraud.

RESULTING TRUST NEED NOT BE IN WRITING, but may be proved by parol, even against the face of the deed or the answer of the trustee.

RESULTING TRUST DOES NOT EXIST IN FAVOR OF HEIRS of persons who made an assignment to another of a money demand and a conveyance of certain real estate, absolute upon their face, and importing a valuable consideration; but upon an express verbal condition that the proceeds from the collection of the demand and the sale of the real estate should be held in trust for the heirs of the assignors and grantors.

EXPRESS TRUST IN LANDS CANNOT BE VERBALLY DECLARED under the Indiana revised statutes of 1831.

IF PARTY WHO SETS UP RESULTING TRUST IN LANDS HAS MADE NO PAYMENT, he cannot be permitted to show by parol evidence that the purchase was made for his benefit.

BILL in chancery. The facts are stated in the opinion.

H. P. Biddle, for the appellants.

D. D. Pratt and S. C. Taber, for the appellee.

By Court, DAVIDSON, J. Bill in chancery by Alexander Irwin and Charlotte, his wife, James Williams and Maria, his wife, Mahala Gahagan, Eliza Ivers, Thomas Ivers, and Virginia Dye, against William Ivers and Samuel Ivers. The said Charlotte, Maria, Mahala, Eliza, Thomas, Virginia, William, and Samuel being the children and heirs at law of Richard Ivers and Deborah, his wife, who died in the year 1836.

On the twenty-sixth of January, 1835, Richard and Deborah, in her right, held a demand for a certain amount of money upon one John Leslie, which by their instrument in writing of that date they assigned to William Ivers, one of the defendants, and thereby empowered him to collect the same for his own use. Also, on the ninth of February, 1835, they conveyed to him, by deed in fee, a tract of land in Darke county, Ohio. In the year 1838 the defendant sold this land for three hundred dollars, and in his own name he instituted suit upon the demand against Leslie in the common pleas of Preble county, Ohio; which suit resulted in a decree in his favor for three hundred and seventy-two dollars. These amounts of three hundred dollars and three hundred and seventy-two dollars were received by said defendant, the former in the year 1838 and the latter in 1841.

The bill alleges that the above assignment and deed, though absolute on their face, were intended by the parties to constitute the defendant a trustee for the children and heirs of the said Richard and Deborah, and that as such trustee he is bound to account, etc. His answer simply denies the existence of such a trust. Upon a final hearing the court dismissed the bill, etc.

The evidence consists mainly of the defendant's admissions, made by him at different periods between the years 1841 and 1849. These admissions appear to have been deliberately made and precisely identified. They seem to us clearly to establish the point of fact that the assignment and deed were both executed and delivered to the defendant with the express verbal condition that he should collect the assigned demand, dispose of the real estate conveyed, and hold the proceeds in trust for the heirs of Richard and Deborah Ivers. Upon this verbal condition the appellants rely for a reversal of the decree. They

contend that though nothing appears in the assignment or deed from which a trust can be inferred, still the proofs in the case sufficiently indicate a trust, one which arises by implication of law, and is not within the operation of the statute of frauds. This case is governed by an act of 1831, which contains the following provisions: "Sec. 5. All declarations or creations of trust or confidence, of any lands, etc., shall be manifested and proved by some writing signed by the party, who by law may be enabled to declare such trust or confidence, etc., or else the same shall be utterly void and of none effect; provided, that when any conveyance shall be made of any lands, etc., by which a trust or confidence may arise or result by implication or construction of law, etc., such trust, etc., shall be of the like force and effect as the same would have been if this act had never been passed," etc. "Sec. 6. All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same," etc.: R. S. 1831, pp. 269, 270.

We have seen that the assignment and deed are in terms absolute, and upon their face import a valuable consideration. The rule is well established that verbal evidence cannot be allowed to disannul or substantially vary a written agreement, except on the ground of fraud. Now the parol evidence before us varies materially both the assignment and deed; and further, it proves a specific trust, verbally declared, when the statute above quoted explicitly provides that "all declarations of trust, unless in writing, shall be utterly void."

The appellee assumes in argument that "there is a broad distinction between declared and implied trusts. The law implies a trust in the absence of one declared. Where a trust is declared, there is no room for implication, and a declared trust must be in writing." As a general rule, we concur in this doctrine, which, when applied to the facts of this case, would seem to favor the ruling of the circuit court. That a resulting or implied trust need not be in writing, and may be proved by parol, even against the face of the deed, or the answer of the trustee, is a principle too plain to admit of controversy. But is the present a case of resulting trust? This is the main question to be considered. Lord Hardwicke, in *Lloyd v. Spillet*, 2 Atk. 150, said that a resulting trust, arising by operation of law, existed: 1. When the estate was purchased in the name of one person, and the consideration came from another; 2. When a trust was declared as to part, and nothing was said as to the residue, that

residue remaining undisposed of remained to the heir at law. He observed that he did not know of any other instances of a resulting trust, unless in cases of fraud. This statement of Lord Hardwicke is quoted by Judge Kent in his Commentaries with seeming approval: 4 Kent's Com. 306. But in the transaction before us no fraud is proved."

In addition, also, to the argument that this trust has been verbally and specifically declared, and is therefore in conflict with the statute, there is still another valid reason why an implied trust does not arise upon the facts presented by the record. No money has been advanced by the *cestui que trust*. "If A. furnishes money to B., with a view to the purchase of an estate, and B. makes the purchase with the money so furnished, and takes the deed in his name, a trust results to A., because he paid the money. The whole foundation of the trust is the payment of the money, and it must be clearly proved. If, therefore, a party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit or on his account:" *Botsford v. Burr*, 2 Johns. Ch. 406. Here it is not pretended that the appellants have paid money, but they rest their case exclusively on the ground of a specific trust, verbally declared when the assignment and deed were executed; and to sustain the position thus assumed, they rely on parol evidence. To allow this would, in our opinion, be a plain overthrow of the statute of frauds: *Movan v. Hays*, 1 Id. 339; *Steere v. Steere*, 5 Id. 1 [9 Am. Dec. 256]; *Sanders on Uses*, 227.

The decree must be affirmed.

The decree is affirmed with costs.

INADMISSIBILITY OF PAROL EVIDENCE TO CONTRADICT OR VARY TERMS OF DEED OR OTHER WRITING: See *Davis v. Ball*, 53 Am. Dec. 53; *Hersom v. Henderson*, Id. 185; *Inglebright v. Hammond*, Id. 430, and prior cases in this series in notes to these decisions; *Waddell v. Glassell*, 54 Id. 170; *West v. Kelly*, Id. 192; *Frederick v. Youngblood*, Id. 209; *Glendale Woolen Co. v. Protection Ins. Co.*, Id. 309; *Porter v. Pierce*, 55 Id. 151; *Melton v. Waitbise*, 60 Id. 481; *Ware v. Coules*, Id. 482; *Russ v. Norton*, Id. 618.

RESULTING TRUST MAY BE PROVED BY PAROL: *Smithal v. Gray*, 34 Am. Dec. 664; *Williams v. Hollingsworth*, 47 Id. 527; *Baker v. Vining*, 50 Id. 617; note to *Neill v. Kees*, 51 Id. 759; *Strimpfer v. Roberts*, 57 Id. 606. The principal case is referred to in *Parnles v. Sloan*, 37 Ind. 482, on the point that parol evidence is admissible to show a trust arising by implication of law. See, however, *Neill v. Kees*, 51 Am. Dec. 746, and note 760; and *post*, these notes. As to the character of the parol evidence, see *Hollida v. Shoop*, 59 Id. 88.

EXPRESS TRUSTS IN LAND, WHETHER MAY BE CREATED BY PAROL: See *James v. Fulcrod*, 55 Am. Dec. 743, and prior cases in note; also *Leskey v.*

Gardner, 33 Id. 764; *McElderry v. Shipley*, 58 Id. 703; *Miller v. Thatcher*, 60 Id. 172. In Indiana an express trust in land cannot be proved by parol: *Barnard v. Flinn*, 8 Ind. 209; so where a conveyance of land by deed absolute on its face is made, the grantor cannot destroy the effect of his conveyance by alleging that there was a verbal agreement that the grantees should hold it in trust for both of the parties: *Mescall v. Tully*, 91 Id. 97, both citing the principal case; but see the principal case distinguished in *Gaultney v. Wheeler*, 26 Id. 417.

RESULTING TRUST WHERE PURCHASE PRICE OF LAND IS PAID BY ONE AND TITLE TAKEN IN ANOTHER'S NAME: See *Neill v. Keese*, 51 Am. Dec. 746, and note 752, where the question is discussed; *Dudley v. Bostwick*, Id. 690; *Beck v. Urich*, 53 Id. 507; *Beck v. Swazey*, 56 Id. 681; *Lisloff v. Hart*, 57 Id. 203; *Stimpfle v. Roberts*, Id. 606, and note collecting prior cases; also *Williams v. Hollingsworth*, 47 Id. 527. A trust results under such circumstances: *Miller v. Blackburn*, 14 Ind. 65; but it cannot be shown by parol unless the consideration for the purchase of the land is paid by the person who claims to be the beneficiary: *Boyer v. Libey*, 88 Id. 236; *Burkert v. Burkert*, 58 Id. 581; *Gilbert v. Carter*, 10 Id. 18; thus it cannot be created by putting money into the hands of another, to be invested for the use and benefit of a third person; this can only be done by an express trust in writing: *Rooker v. Rooker*, 75 Id. 574. The principal case was cited in the foregoing Indiana cases. See, on this last proposition, *Neill v. Keese*, 51 Am. Dec. 746.

TRUST BY IMPLICATION DOES NOT ARISE WHERE EXPRESS TRUST IS DECLARED: *Miller v. Blackburn*, 14 Ind. 80; *McDonald v. McDonald*, 24 Id. 70, both citing the principal case.

PURSLEY v. MORRISON.

[7 INDIANA, 356.]

AGENT'S ACT MUST BE SHOWN TO HAVE BEEN DONE WITHIN SCOPE OF AGENCY, where a principal is sought to be charged for the act of a special and not a general agent.

BURDEN OF PROOF IS UPON PRINCIPAL TO SHOW TERMINATION OF AGENCY before the act complained of was done, if the agent continues to act within the scope of his agency.

ONE WHO PERMITS ANOTHER TO HOLD HIMSELF OUT TO WORLD AS AGENT ADOPTS LATTER'S ACTS, and will be bound to a person who gives credit to him in the capacity of agent.

EXECUTION OF NOTE IS ADMITTED AS TO ONE OF TWO DEFENDANTS, where the denial of the execution is sworn to by the other only.

ACTION UPON A PROMISSORY NOTE AND UPON AN ACCOUNT. The opinion states the facts.

J. B. Julian and W. A. Peelle, for the appellant.

J. Rariden, for the appellees.

By Court, GOOKINS, J. Pursley sued Morrison & Newby upon a promissory note in the following form: "January 10, 1853. One day after date, for value received, we promise to

James Purseley or order one hundred and seventy-five dollars. Morrison, Newby, Robertson."

Also for an account dated January 1, 1853, for one hundred and sixty-five bushels of corn, at thirty-five cents per bushel.

The first paragraph of the complaint charges the defendants on the note as surviving partners of Robertson, who is alleged to be dead; the second charges them for the corn; the third alleges that the defendants made the note by Robertson as their agent, who, it is alleged, signed his name to it as a principal by mistake, when he should have signed as agent merely; the fourth is like the second. The answer denied generally the allegations of the complaint, and the execution of the note was denied, under oath, by the defendant Morrison. Jury trial. Verdict for the defendants. Motion for a new trial overruled, and judgment. The record contains the evidence.

It appeared in evidence that from the spring of 1848 to March, 1851, the defendants, who resided at Cambridge City, in Wayne county, had a store of goods at Maxwell, in Randolph county, some twenty-five miles distant; that Robertson superintended the business for them; was in the habit of buying stock, such as cattle, hogs, and sheep, for them, sometimes for cash, and sometimes on credit. In March, 1851, Robertson bought the establishment from the defendants, which fact was known to the plaintiff, and continued business until December of that year, when he sold out to some one else. There was evidence tending to prove that he bought and sold stock for them until the spring of 1853; that while acting as their agent, before his purchase from them, he signed notes in their names for stock and for borrowed money, which they paid; that he continued to trade in stock until his death, in December, 1853, and was in the habit of using the defendants' names until that time; that one of the defendants was at Maxwell occasionally on their business until Robertson's death; that some of the hogs which the defendants got were taken to the plaintiff's by Robertson's directions, where they were fed a hundred and sixty-five bushels of corn, worth thirty-five cents per bushel. This was in January, 1853. A witness who had transacted business for the defendants at Maxwell, and had paid notes for them signed by Robertson, testified that he never heard any objection from the defendants to Robertson's authority to act for them until the time of trial. There was also evidence tending to show that Robertson purchased the stock on his own account, and sold to the defendants, they advancing him money to enable him to make the purchases.

The court of common pleas gave the jury the following instruction, to which the plaintiff excepted, to wit: "If the note was given for borrowed money, or if the evidence does not show it to have been given for stock, or is silent as to what it was given for, the plaintiff cannot recover."

We do not think the plaintiff can complain of this instruction. There was no evidence tending to show that the note was given for borrowed money. The evidence being all upon the record, we are enabled to see that there was nothing to which the first branch of the instruction could apply, and consequently, whether right or wrong, the giving of it was not error, for the reason that it could do no harm. As to the second and third branches of the instruction, there is no evidence that the defendants and Robertson were at any time partners; consequently, if the latter had any authority to use their names, it was as their agent. The plaintiff knew of the change of the business in March, 1851, when his agency in reference to the goods terminated. Previous to that time he had used their names generally, but subsequent to it there is no evidence tending to show that he used it, except in the purchase of stock, and the jury were authorized, under the second branch of the instruction, if it was given for that purpose, to find for the plaintiff. If there was no evidence for what it was given, the third branch of the instruction was manifestly correct. Where parties are sought to be charged for the act of a special and not a general agent, it must be shown that the act was done within the scope of the agency.

The following instruction asked by the plaintiff was refused: "If the plaintiff has shown Robertson to have been the agent of the defendants, signing their names to notes a few years before the note sued on was given, and he continued to transact business for them until after the note sued on was given; if there was an end put to the agency, it was for them to show it; and if they have failed to show the determination of it, the jury should find its continuance."

This instruction, we think, ought to have been given. The proposition, stated in different language, is, that if an agent continues to act within the scope of his agency, the burden of proof is upon the principal to show that the agency was terminated before the act complained of was done. We do not pretend to intimate what the proof establishes in this case. There was proof tending to show that he acted as the agent of the defendants, with their knowledge, until his death. By permitting another

to hold himself out to the world as his agent, the principal adopts his acts, and will be bound to the person who gives credit thereafter to the other in the capacity of his agent: 2 Kent's Com. 614. McIntyre, a witness, testified that it was a common practice for Robertson to give the notes of Morrison & Newby, up to the time of his death. Their relations to Robertson were such that they may or may not have known it; that question was for the jury. For the error in refusing this instruction, the judgment must be reversed.

We think the judgment erroneous on another ground: the denial of the execution of the note was sworn to by Morrison only; it stood admitted as to Newby: *Taylor v. Gay*, 6 Blackf. 150; 2 R. S., p. 44, sec. 80.

The judgment is reversed with costs. Cause remanded, etc.

PRINCIPAL, HOW FAR BOUND BY ACTS OF SPECIAL AGENT: See *Rossiter v. Rossiter*, 24 Am. Dec. 62, and note collecting prior cases in this series; *Jeffrey v. Bigelow*, 28 Id. 476; *Benjamin v. Benjamin*, 39 Id. 384; *Baring v. Peirce*, 40 Id. 534; *Brown v. Johnson*, 51 Id. 118; *Towle v. Leavitt*, 57 Id. 195. Where parties are sought to be charged for the act of a special and not a general agent, it must be shown that the act was done within the scope of the agency: *Thomas v. Atkinson*, 38 Ind. 258; see also *Holcraft v. Halbert*, 16 Id. 258. A special agent cannot bind his principal in a matter beyond or outside of the power conferred, and the party dealing with a special agent is bound to know the extent of his authority: *Blackwell v. Ketcham*, 53 Id. 186. If the principal has never held the agent out as having any general authority whatever in the premises, it is the duty of one dealing with him to inquire, and if he trusts without inquiry, he trusts to the good faith of the agent, and not of the principal: *Reitz v. Martin*, 12 Id. 308. The principal case was cited in the foregoing Indiana decisions.

PRINCIPAL MUST SHOW TERMINATION OF AGENCY, if the agent continued to act as before: *Baltimore etc. R. R. v. McWhinney*, 36 Ind. 445, citing the principal case.

FAILURE TO DENY, ON OATH, EXECUTION OF NOTE not only admits cause of action against a copartnership, but a denial under oath by one partner puts the plaintiff to proof as to that one only: *Pegg v. Bidleman*, 5 Mich. 29, following the principal case.

CASES
IN THE
SUPREME COURT
OF
IOWA.

LATTERETT v. COOK.

[Iowa, 1.]

PLAINTIFF IS NOT REQUIRED TO ATTACH TO HIS PETITION EVIDENCE in the case, but simply the instrument or account on which he brings his suit. IN ACTION ON JUDGMENT OF ANOTHER STATE, IF PLAINTIFF FILES WITH HIS PETITION TRANSCRIPT consisting of a declaration in *assumpsit* and the judgment thereon, he is not precluded from offering in evidence on the trial a further or amended transcript containing, in addition to the declaration and judgment contained in the first transcript, a copy of the original writ or summons, and the service thereon.

RECORD WHICH SHOWS CAUSE OF ACTION AND JUDGMENT RENDERED THEREON is, in an action on a judgment of a sister state, sufficient to annex to plaintiff's petition, under the provisions of section 1750 of the Iowa code, which requires that when a pleading is founded on a written instrument a copy thereof must be annexed to such pleading.

JUDGE'S CERTIFICATE TO TRANSCRIPT OF JUDGMENT OF ANOTHER STATE, signed by "a presiding judge," or by "one of the judges," is sufficient under section 2348 of the Iowa code.

LEGISLATURE OF STATE MAY CONTROL MODE OF AUTHENTICATION of the public acts, records, and judicial proceedings of other states, within its own limits and in its own courts. The method of authentication prescribed by congress is not exclusive of any that the states may adopt in their own courts.

WHERE RECORD OF JUDGMENT SHOWS THAT SUMMONS WAS ISSUED in the case under the seal of the court of a sister state, and returned "served" by an officer, who, it appears, was sheriff of the county, the courts of Iowa will not, in an action on such judgment, inquire into the sufficiency of such return, when no evidence to contradict it is offered by the defendant. The question whether that return was sufficient evidence of service under the laws of the state where the judgment was rendered might be raised in the appellate court of that state, but not here, merely upon the record, without further or other proof.

PLEAS IN BAR OF SUITS ON JUDGMENTS OF SISTER STATES must deny, by clear and positive averments, every fact which would go to show jurisdiction, whether with reference to the person or the subject-matter; and where the defendant in the court below fails to deny the jurisdiction of the court in which the judgment was rendered, of the subject-matter of the suit, he cannot raise that question for the first time in the supreme court.

DEPOSITION OF WITNESS IS NOT COMPETENT TO PROVE STATUTE of a sister state. The Iowa code provides that such statute may be proved by producing a printed copy.

IMPROPER ADMISSION OF IMMATERIAL EVIDENCE WHICH HAS WORKED NO PREJUDICE to the party complaining is not ground for disturbing the judgment of the court below.

SUIT on a judgment rendered in the inferior court of common pleas of Essex county, state of New Jersey. Judgment was rendered for the plaintiff, and the defendant appealed. The other facts are stated in the opinion.

L. A. Thomas, for the appellant.

Smith, McKinlay, and Poor, for the appellee.

By Court, WRIGHT, C. J. The objections urged against the correctness of the judgment below are quite numerous, and without specifying each in detail, we shall consider them in such connection as will best conduce to a clear understanding of the points decided.

At the time the petition was filed, plaintiff accompanied it with what purported to be a transcript of the judgment sued on. This consisted of a declaration in *assumpsit* and the judgment thereon, being against defendant and in favor of plaintiff. The authentication of this record we shall refer to hereafter. On the trial of the cause, it appears that said transcript, so attached to plaintiff's petition, was introduced in evidence, as also a further or amended transcript, which, in addition to the declaration and judgment contained in the first, also contained a copy of the original writ or summons, and the service thereon. To the introduction of the second transcript defendant objected, for the reason that the first imported absolute verity on its face; and that no amended transcript could be introduced to supply any omissions or defects of the first; also because it was not a transcript of the whole record, but only a portion thereof.

We think these objections were correctly overruled. While the first transcript did import verity, it did not import to be all the record. Though it was certified to be a true transcript of the declaration and judgment, it did not profess to contain the

whole truth of the record. The second contained the same judgment, the same declaration, and in addition thereto, copies of the original writ and service. It is not the evidence in the case that the plaintiff is to attach to his petition, but a copy of the instrument or account on which he brings his suit. The object is to give the defendant notice of the cause of action, and not to give him the evidence to sustain it. Suppose the plaintiff had filed a copy of the judgment sued on, and had afterwards obtained and introduced a transcript of the declaration, writ, service, judgment, and everything else that might be of file in the particular case: what rule should exclude it? We are aware of none, nor do we see how such a rule could be sustained by any fair and legitimate reasoning. The obtaining of a perfect transcript of the entire record after suit brought does not make the judgment sued on any less a verity than if obtained before. For the purposes contemplated by section 1750 of the code, the record attached to this petition was sufficient. The subsequent transcript did not, nor was it designed to, supply any defects in that record, so far as to change it or to make it another and different cause of action; but was only a more complete transcript of the same record and proceeding. Neither are we aware that it was necessarily incumbent on the plaintiff to obtain a transcript of the whole record; or if it was, that it should all be in one transcript. He might have contented himself with introducing the last record, but he appears to have introduced both, and we see no reason for excluding the second. It was only necessary for the court to be satisfied with the verity of the record; and if so satisfied, it has even been held that it may be admitted, though the copy was on three distinct sheets of paper: *United States v. Wood*, 2 Wheel. Cr. Cas. 326, 328; 4 Phill. Ev., Cowen & Hill's notes, 322.

It was next objected that neither of the transcripts were admissible, by reason of defects in the certificates of the judge. One transcript purports to have the certificate of "Stephen R. Haines, a presiding judge," and the other that of "Zenas S. Crane, one of the judges," etc. The objection is, that neither of these certificates appear to be signed and executed by the judge, chief justice, etc., as provided by the law of congress on this subject. Without pretending to determine the sufficiency of these certificates under the act of May 26, 1790, we think they were sufficient under section 2348 of the code. This section provides that "the judicial records of a sister state may be proved by the attestation of the clerk and the seal of the court annexed,

together with a certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law." This section merely regulates the admission of evidence, and we see no reason why it is not entirely competent for the legislature to control this matter as evidence within our own limits and in our own courts. The first certificate is signed by "a presiding judge," and the second by "one of the judges," and inasmuch as the first uses the exact language of our law, and, as far as relates to the second, the officer could not be *one* of the judges without being *a* judge, we think this objection was not well taken. The method prescribed by congress is not exclusive of any that the states may adopt with reference to such authentication in their own courts: See 1 Greenl. Ev., secs. 489, 505, and cases cited in the last section.

It is further urged against the correctness of this judgment that the record which was introduced in evidence and relied upon does not show that the court rendering the judgment sued on had jurisdiction of the person of the defendant or subject-matter of the suit.

So far as relates to the question of jurisdiction over the person, the record shows that a summons was issued in the case, under the seal of the inferior court of Essex county, New Jersey, and returned by the officer "served," to which he signs his name, and it appears that he was the sheriff of the county. Can our courts inquire into the sufficiency of that return, where there is no evidence offered by the defendant, by the statutes of New Jersey or otherwise, to show its incorrectness or contradict it? We think they cannot. Whether that return was sufficient evidence of service under the laws of the state where the judgment was rendered, was a question that might be raised by the appellate court of such state, but not here, merely upon the record, without further or other proof. We are not prepared to say that a judgment rendered against a defendant upon such a return would be void or a nullity. The court rendering the judgment appears to have determined that there was such personal service as to authorize it to proceed to the rendition of a judgment, and until such cause was revised by the proper appellate court, we see no good reason against presuming at least in favor of the jurisdiction of the court over the person of the defendant, where no proof to the contrary is introduced. The case of *Wilson v. Jackson*, 10 Mo. 329, was in many respects very similar to this. In that case the transcript showed that the writ had been returned by the sheriff "executed." In a suit on such

judgment rendered against the defendant in Virginia, the supreme court of Missouri held that the judgment of a sister state is *prima facie* evidence of jurisdiction of the person, where the writ was returned "executed," though the writ may be informal. See also, as to the manner of taking advantage of a judgment rendered upon an imperfect return, *Hall v. Williams*, 6 Pick. 232 [17 Am. Dec. 356]. Did this record show affirmatively that the writ was returned "not found," it would present an entirely different question. On the contrary, in addition to the return above referred to, the judgment itself recites that it was rendered on the day on which the defendant had been held to answer. The cases of *Cone v. Cotton*, 2 Blackf. 82, and *Hall v. Alloway*, Id. 108, will be found to be cases where there was no service, and the record disclosed that fact. They therefore have no fair analogy to the case at bar.

We next consider the question of jurisdiction over the subject-matter, which has been raised here in the argument, as to courts of superior and inferior, special and limited, jurisdiction, and the presumptions that do and do not arise in favor of the same. An examination of the doctrines that obtain on this subject becomes entirely unnecessary in this case. It appears that the defendant in his answer set up two defenses, one denying the existence of any such record, and the other alleging that he never was served with process, in the original proceeding, and averring generally that the court in New Jersey had not jurisdiction of his person. There is no defense, answer, or plea urging or pretending that the court in New Jersey had not jurisdiction of the subject-matter. Having made no such issue in the court below, he cannot now urge it in this court. It was his duty to have raised the question of jurisdiction as to the subject-matter in the court below, so that plaintiff, if it was necessary, could have introduced other testimony, by the statutes of New Jersey or otherwise, to show such jurisdiction. We do not intimate an opinion as to the necessity of such proof outside of the record, even if such defense had been pleaded, but hold that pleas in bar of suits commenced on such judgments must deny, by clear and positive averments, every fact which would go to show jurisdiction, whether with reference to the person or the subject-matter. And this, we think, is clear from the reason of the thing as well as from authority: 2 Kent's Com. 261; *Harrod v. Barreto*, 1 Hall, 171; Code, 1742.

The last question relates to the admission of the testimony of one Webster. It appears that the plaintiff introduced the depo-

sition of this witness for the purpose of proving the statutes of New Jersey, or so much thereof as related to the manner of service of process and the return thereof. We think this testimony was inadmissible. Our code, section 2443, provides for the manner of proving such statutes. This is done by producing printed copies. While this would not exclude other methods of proof, such as producing copies duly authenticated under the seal of the state, as contemplated by the act of congress, yet we do not think that the method resorted to in this case was correct. The written law or statutes of another state cannot be so proved. We refer on this subject to 1 Greenl. Ev. 189; 4 Phill. Ev., Cowen & Hill's notes, 329-332; *Robinson v. Clifford*, 2 Wash. C. C. 1; *Kenny v. Clarkson*, 1 Johns. 385 [3 Am. Dec. 336]; *United States v. Ortega*, 4 Wash. C. C. 531. We have, however, shown herein that the transcript, including the writ and return, was properly admissible without reference to this testimony. No evidence appears to have been introduced *aliunde* to impeach its verity or conclusiveness. This testimony was therefore entirely immaterial and could not make more perfect the plaintiff's right to recover. Without reference to it the judgment is correct, and should have been rendered as it was on the transcript alone. Under such circumstances, this court would not disturb the judgment below. We understand this rule to be well settled: See *Wilkinson v. Daniels*, 1 G. Greene, 179; also, as to this point and questions much analogous, as where it is apparent that no prejudice was worked to the party complaining, see *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 450 [22 Am. Dec. 337]; *Overley v. Paine*, 3 J. J. Marsh. 717; *Smith v. Ruecastle*, 2 Halst. L. 357; *Bellissime v. McCoy*, 1 Mo. 318; *Buckfield v. Gorham*, 6 Mass. 445; *Pate v. Spotts*, 6 Munf. 394; *Hemmenway v. Hickes*, 4 Pick. 497; *Miller v. Starks*, 13 Johns. 517; *Hunter v. Jones*, 6 Rand. 541; *Reed v. McGrew*, 5 Ohio, 375; *Phillips v. Jordon*, 3 Stew. 38; *Faulcon v. Harriss*, 2 Hen. & M. 550; *Beeman v. State*, 5 Blackf. 165.

Having thus disposed of the various points urged by the appellant, we are brought to the conclusion that this judgment must be affirmed.

Judgment affirmed.

AUTHENTICATION OF JUDGMENT OF SISTER STATE: See *Seville v. Alison*, 52 Am. Dec. 393, note 399; *Gay v. Lloyd*, 46 Id. 499, note 506; *McRae v. Stokes*, 37 Id. 699, note 701, where other cases are collected. The Iowa statute makes the certificate of a judge, whether he was presiding judge or not, sufficient: *Simons v. Cook*, 29 Iowa, 325, citing the principal case.

IN ACTION ON JUDGMENT OF SISTER STATE, the defendant may show any fact tending to prove that the court had no jurisdiction over him so as to give effect to such judgment: *Phelps v. Brewer*, 57 Am. Dec. 56, note 62. The whole doctrine of the binding force and effect of a foreign judgment rests on the foundation of jurisdiction: *Melhop v. Doane*, 31 Iowa, 400, citing the principal case.

APPEARANCE OF ATTORNEY: See *Roselius v. Delachaise*, 52 Am. Dec. 597, note 599, where other cases are collected. In an action on a judgment of a sister state, the judgment debtor may show that the attorney who appeared for him in the original suit had no authority: *Harshey v. Blackmarr*, 20 Iowa, 173, citing the principal case.

QUESTIONS NOT RAISED IN COURT BELOW WILL NOT BE CONSIDERED ON APPEAL: See *Amidown v. Osgood*, 58 Am. Dec. 171, note 174, where other cases are collected; *Heaton v. Fryberger*, 38 Iowa, 207, citing the principal case.

FOREIGN STATUTORY LAW, HOW PROVED: See *Emery v. Berry*, 61 Am. Dec. 622, note 628, where other cases are collected: *Spangler v. Jacoby*, 58 Id. 571, note 574.

ERROR WITHOUT PREJUDICE IS NOT GROUND FOR REVERSAL: See *Persons v. McKibben*, 61 Am. Dec. 85; *Johnson v. Jennings*, 60 Id. 323, note 330, where other cases are collected; *Moore v. Clay*, Id. 461, note 463; *Abell v. Cross*, 17 Iowa, 173; *Sheriff v. Hull*, 37 Id. 178, both citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Taylor v. Runyan*, 3 Iowa, 478.

STOWERS v. MILLEDGE.

[1 IOWA, 150.]

JUDGMENT OF JUSTICE OF PEACE IS SUFFICIENTLY CERTAIN AND DEFINITE where, after stating the names of the parties, the cause of action, the amount claimed, the manner in which the cause came before him, and the meeting of the parties by their counsel, it sets forth that "after hearing all the testimony on both sides, it is believed that the plaintiff is entitled to seventy-five dollars debt, and cost of suit, which is taxed as follows."

PARTY APPEALING FROM JUSTICE'S JUDGMENT CANNOT MOVE TO DISMISS the appeal in the appellate court on the ground that the certificate of the justice to his transcript is defective.

APPEAL from the Lee district court. The plaintiff sued the defendants before a justice of the peace, claiming one hundred dollars for injuries sustained by the acts of the defendants in assaulting and stabbing the plaintiff. The justice tried the cause, and made a record which, after stating the names of the parties, the amount claimed, the cause of action, and that the cause had come before him by change of venue, proceeded thus: "And agreeable with the order, the parties met by their counsel, Cochran for the plaintiff, and J. R. Richardson for the defendants. After hearing all the testimony on both sides, it is

believed that the plaintiff is entitled to seventy-five dollars debt, and cost of suit, which is taxed as follows." From this judgment the defendant appealed to the district court. In that court the appellants moved to dismiss the appeal, on the ground that there was no judgment from which an appeal could be taken. This motion was overruled, and after trial, judgment was rendered for the plaintiff in the same amount as before the justice. The defendants assign for error the overruling of their motion to dismiss the appeal.

Samuel F. Miller, for the appellants.

John M. Beck, for the appellee.

By Court, WRIGHT, C. J. Two questions are presented: 1. Was this a judgment from which an appeal could be taken to the district court? and 2. Could the defendants, after treating it as such, and doing all those things that showed that they regarded it as a valid judgment, object to it, and the jurisdiction they had sought thus to give? If either of these questions is decided against the defendants, this case must be affirmed.

The language used by the justice is certainly not in the usual form, or such as rigid and purely technical rules would require. We would not encourage, on the part of the inferior courts, carelessness in the making of their entries; nor, on the other hand, would we require too great particularity or specific formula. We adopt the language used in *Taylor v. Barber*, 2 G. Greene, 352, that "it is not expected that technical nicety and legal precision can characterize these proceedings; and hence irregularity and deficiency in form are viewed with liberality." But when we come to that which is claimed to be the judgment, there must be reasonable certainty and conclusiveness, so that the judicial mind can say it is satisfied that it was a substantial final order.

By our law, "all final adjudications of civil actions are judgments;" Code, sec. 1814. In the entry thereof, must the justice follow any particular form? We know of no authority or reason for his so doing. In *Lyles, Ordinary, v. McClure*, 1 Bailey L. 7 [19 Am. Dec. 648], it is held that, "beside the time and place, a judgment should exhibit the parties, the matter in dispute, and the result, but the form is immaterial." And this we hold to be the general and correct doctrine. We must look to the substance, and mere form becomes immaterial. Here there can be no reasonable doubt as to the parties or what was in dispute; and if we have the result with sufficient certainty, it is all that

is required. Much would have to be presumed against the legal and ordinary effect of the language and this record to say that the result or conclusion is not substantially stated. The parties are before the justice, one known as the plaintiff and the others as defendants, in a suit pending; the subject-matter in dispute is quite clearly stated; they try that subject-matter, and when it is all heard, the justice enters on his docket the result, that "plaintiff is entitled to seventy-five dollars." It is said that the word "believed" is not sufficiently definite. The usual form is, perhaps, "it is considered." Is there any substantial difference in the two terms? We think not. Who believes or considers? The justice, certainly. For what is plaintiff entitled to the seventy-five dollars? We answer, For the injuries sustained, and which the parties there met to adjudicate. From whom is he entitled to have this amount? The only reasonable and fair construction is, from the defendants of whom he claimed it, and who were there defending. An unwarranted degree of technicality might claim this language to be too indefinite, but we must take the whole record together; bear in mind that it was a judicial proceeding; the expression and putting on paper the conclusion of the mind acting judicially; and in this view of it, reasonable certainty is shown, and all reasonable doubt and uncertainty excluded.

Defendants have referred us to *Hubbard v. Birdwell*, 11 Humph. 220, and *Bood v. School District No. 7*, 1 Doug. (Mich.) 502. We cannot see that the authority in Humphrey touches the question at bar; or if it does, the record was so entirely dissimilar that we should not regard it as of weight. In the case in Douglass a prominent difference, as compared with the one we are now considering, is that there was no finding in favor of any party or against either party. That also was a suit brought to recover upon a judgment which was held to be too indefinitely and uncertainly set forth. Here there is a clear finding in favor of one party, and the question arises on a motion by the party appealing, to dismiss his own appeal, because there was no judgment rendered against him from which he could appeal. We are also referred to the case of *Kimble v. Riggan*, 2 G. Greene, 245. In that case there was no judgment and no attempt to enter a judgment, but merely the verdict of a jury appealed from. Here the cause was heard and determined by the justice without the intervention of a jury, and at least an attempt to enter a judgment.

It is urged in argument by defendants that the certificate of

the justice to his transcript was not sufficient, and for that reason the motion to dismiss should have been sustained. We shall not inquire whether the certificate is good in form or not. We are unwilling to recognize the doctrine that a party can take his appeal from an inferior court and have his motion sustained to dismiss the same because he did not do his duty. Suppose there was no certificate to this transcript, could the appellants object? The other party might, but the party taking the appeal could not.

The above conclusion, as to the first point, will render the consideration of the second unnecessary.

Judgment affirmed.

JUSTICE'S JUDGMENT MUST BE AUTHENTICATED by some record, and no effect can be given to one never actually entered: See *Brennan v. Bond*, 54 Am. Dec. 147, note 148, where other cases are collected.

WHERE INTENTION OF JUSTICE OF PEACE TO GIVE FINAL JUDGMENT is apparent, the judgment will be final: See *Kase v. Best*, 53 Am. Dec. 573, note 574, where other cases are collected. And where the justice has made an attempt to enter a judgment, although it may be informal, it will be treated as a judgment: *Moore v. Manser*, 9 Iowa, 48; *Barrett v. Garrigan*, 16 Id. 49; *Lavalle v. Badgley*, 33 Id. 156, all citing the principal case.

HORN v. NASH.

[1 IOWA, 204.]

INTEREST IS TO BE COMPUTED FROM DATE, AND NOT MATURITY, of a promissory note which contains a stipulation, if not paid when due, to bear interest at a certain rate.

ACTION on the following note: "On or before the first day of March, 1854, we, or either of us, promise to pay George W. Games or order one hundred and thirty-eight dollars and ten cents. If not paid when due, to bear twenty-five per cent interest, for value received; payable at Bloomfield, Davis county, Iowa. March 31, 1852." The note was indorsed to the plaintiff. On the back of it were indorsed these credits: May 24, 1854, one hundred dollars; July 7, 1854, forty-seven dollars and eighty-five cents. The cause was submitted without other evidence than the note and its indorsements, and judgment was rendered for the defendants for costs. The plaintiff appeals, and assigns for errors: 1. That the court erred in the computation of the interest; 2. That the interest should have been computed from the date, instead of from the maturity, of the note.

Knapp and Caldwell, for the appellants.

David P. Palmer, for the appellees.

By Court, WOODWARD, J. The only question is, whether the note bears the stipulated rate of interest from date or from its maturity. The district court held the latter.

Such is the ambiguity of the terms of this note, as bearing on this question, that if it were submitted to a hundred indifferent minds they would probably differ upon it nearly equally. Two of the members of this court have it to adjudicate, the chief justice having been of counsel, and the mind of one of us, independent of adjudicated cases, would incline to the decision of the district court. But the question being very doubtful as an original question, and having been several times judicially determined, we conclude to adhere to the decisions: *Parvin v. Hoopes*, Morris, 294; *Daggett v. Pratt*, 15 Mass. 177; 1 Mon. & H. Dig. 991.

Such a contract is easily made plain by the use of a word, as in *Wright v. Shuck*, Morris, 425; *Wilkinson v. Daniels*, 1 G. Greene, 179.

The judgment must be set aside and a new trial granted.

AGREEMENT TO PAY SUM OF MONEY AT CERTAIN TIME after date, and if not then paid to pay interest thereon from the date thereof, is by the greater weight of authority regarded as a valid agreement, and in case of default, interest may be recovered from the date: 1 Am. Lead. Cas., 5th ed., 615, in the note to *Sellick v. French*; Wood's Mayne on Damages, 1st Amer. ed., 215; *Alexander v. Troutman*, 1 Ga. 469; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Davis v. Rider*, 53 Id. 416; *Witherow v. Briggs*, 67 Id. 96; *Bane v. Gridley*, Id. 388; *Downey v. Beach*, 78 Id. 53; *Walker v. Abt*, 83 Id. 226; *Gully v. Remy*, 1 Blackf. 69; *Horner v. Hunt*, Id. 213; *Wernwag v. Mothershead*, 3 Id. 401; *Hackenberry v. Shaw*, 11 Ind. 392; *Rumsey v. Matthews*, 1 Bibb. 242; *Satterwhite v. McKie*, Harp. L. 397; *Fisher v. Otis*, 3 Chand. 99.

There are some decisions, however, in which it has been held that the interest by such an agreement stipulated to be paid is in the nature of a penalty, and not recoverable: *Fugua v. Carriel*, 12 Am. Dec. 46; *Dinmore v. Hand*, Minor, 126; *Henry v. Thompson*, Id. 209; *Waller v. Long*, 6 Munf. 71. Where this latter doctrine prevails, of course no such question as that decided in the principal case can arise. And even where the interest reserved in case of failure to make prompt payment at maturity is not regarded as a penalty, but as liquidated damages, this precise question can only arise when the language of the stipulation is similar to that of the note in question in the principal case. The only case of this kind, in addition to those cited by the court in the principal case, that we have been able to find, is that of *Hackenberry v. Shaw*, 11 Ind. 392. In that case the language of the stipulation was: "With six per cent interest, if not paid at maturity." The court decided that where the bill was not paid at maturity the interest should be computed from the date of the bill. The legal rate of interest in Indiana at that time was six per cent. Worden, J., delivering the opinion of the court, said: "The only ques-

tion raised in the case is, whether interest should be computed from the date of the bill, or only from the time of the default. The court below allowed interest from the date of the bill. This, we think, was right. To construe the words 'with six per cent interest, if not paid at maturity,' to mean interest from the time of default merely would be equivalent to striking them out of the bill entirely. That would be the effect of the bill without any statement as to interest."

It seems to be generally agreed that where an instrument is payable at a future day, with interest, and nothing is said in it as to when the interest is to be calculated from, it is to be computed from the date of the instrument: *English v. Wallins*, 4 Ark. 199; *Winn v. Young*, 1 J. J. Marsh. 51; *Whitton v. Swope*, 1 Litt. 160; *Pate v. Gray*, Hemp. 155; *Kennerly v. Nash*, 1 Stark. 452; *Hopper v. Richmond*, Id. 507; *Richards v. Richards*, 2 Barn. & Adol. 447; *Roffey v. Greenwell*, 10 Ad. & El. 222; Wood's *Mayne on Damages*, 1st Am. ed., 342. Lord Denman, C. J., delivering the opinion of the court in *Roffey v. Greenwell*, said: "Generally speaking, an instrument of this sort carries interest from its date, whether payable on demand or at a time specified. The reason is, that the party who makes the promise must be expected to keep it; and if he does, no interest can be due from any other period than the date." And Robertson, J., delivering the opinion of the court in *Winn v. Young*, 1 J. J. Marsh. 52, said: "There can be no doubt that the plaintiff was entitled by the contract to interest from the date of the note. The language employed is susceptible of no other rational or consistent construction. It would be absurd to suppose that a note for the payment of money on a particular day with interest could be construed to mean that the interest should commence on the day of payment, and not before, for the law would give interest from that time."

If a stipulation to pay interest on a sum of money payable at a future date, if it be not then punctually paid, is a valid agreement, there seems to be no good reason why the interest should not be computed from the date of the instrument. And this is the rule adopted by all the authorities that maintain the validity of such stipulations. In *Shirley v. Harris*, 3 McLean, 330, it was decided that an agreement to pay ten per cent interest, if a certain note given some time before should not be punctually paid when due, was without consideration, and could not be enforced.

STIPULATION TO PAY HIGHER RATE OF INTEREST AFTER MATURITY.—In some cases parties to contracts for payment of money at a future date stipulate that in case payment be not punctually made at the specified time a higher rate of interest shall be payable after default than that agreed to be paid before default. In the case of *Mason v. Callender*, 2 Minn. 350, the note in question was made payable "with interest at the rate of three per cent per month," and "with interest after maturity, upon principal and interest, at the rate of five per cent per month until paid." The court held that the agreement to pay the increased rate of interest after maturity was not a contract for the payment of interest at a rate agreed by the parties, but an attempt to liquidate the damages for the failure to perform the contract. And it was decided that after the maturity of the note the payee could only recover the legal rate of interest. In delivering the opinion of the majority of the court, Flandrau, J., said: "Interest, being the creature of contract, is recoverable strictly as interest only during the continuance of the contract, and as provided by its terms before breach, and not after." And the court decided that where the stipulation is to pay a greater sum on default of paying a lesser one, no form of words will change it from a penalty

to liquidated damages. The ground of the decision was that the increased rate after maturity was in the nature of a penalty, and therefore not recoverable. The doctrine of *Mason v. Callender, supra*, on this point, was affirmed in these cases: *Talcott v. Marston*, 3 Minn. 339; *Kent v. Bowen*, Id. 347; *Newell v. Houlton*, 22 Id. 19; *White v. Iltis*, 24 Id. 43.

In *Newell v. Houlton, supra*, it was decided that an agreement in a note to pay a greater rate of interest after maturity than before is unauthorized and invalid, and its effect is to make the rate after maturity seven per cent, the legal rate. In *White v. Iltis, supra*, there was a provision in each of the notes issued on to this effect: "The rate of interest to be ten per cent per annum if not paid at maturity, and attorney's fees of ten per cent if placed in the hands of an attorney for collection." The effect of this provision was held to be to provide for the payment of a higher rate of interest after than before maturity; and under the rule in *Newell v. Houlton, supra*, the rate after maturity was reduced to seven per cent, the legal rate.

In *Holles v. Wyse*, 2 Vern. 289, interest was reserved on a mortgage at five per cent, but if not duly paid then to be six per cent. There being a great arrear of interest, the mortgagor was decreed to pay but five per cent, the reservation at six per cent being regarded only *nomine panae*. To the same effect is *Strode v. Parker*, Id. 316. But in the case of *Herbert v. Salisbury & Y. R'y Co.*, L. R., 2 Eq., 221, it was held that a stipulation in a contract for the sale and purchase of certain lands for the payment of a higher rate of interest on sums that should be due at certain future dates was not in the nature of a penalty to secure the payment of the purchase money, against which the purchaser was entitled to be relieved, but a separate and distinct contract which he was bound to perform. All the cases agree that an agreement to pay at a certain time a certain sum with interest, and if paid punctually the interest to be remitted or lowered, is a valid agreement: 1 Am. Lead. Cas., 5th ed., 615, note to *Selleck v. French*; *Ely v. Witherspoon*, 2 Ala. 131; *Waller v. Long*, 6 Munf. 71; *Nicholls v. Maynard*, 3 Atk. 521; *Herbert v. Salisbury & Y. R'y Co.*, L. R., 2 Eq., 221.

PIERSON v. ARMSTRONG.

[1 Iowa, 282.]

EQUITY WILL NOT GRANT RELIEF UPON GROUND OF MISTAKE arising from ignorance of law.

WHERE FATHER CONVEYS LAND TO MARRIED DAUGHTER in consideration of love and affection, and upon condition that if she shall die without children living at the time of her death the land shall revert to the grantor and his heirs, as though no conveyance had been made; and the daughter dies, leaving an infant child surviving her, who subsequently dies leaving his father heir to the property, a bill filed by the grandfather of the child against his father, alleging that it was the complainant's intention in making the deed to his daughter that her husband should never in any event have any interest in or control over the property, and that the deed was executed by him with that understanding, and praying that the complainant may be quieted in his title, and that the cloud cast thereon by said deed be removed, shows no equitable right in the complainant.

WORDS "HAVE GIVEN AND GRANTED," IN DEED, are sufficient to pass an estate in fee; and the words "to her and her own proper and legal heirs forever," in the *habendum* of a deed, are sufficient to pass an estate of inheritance.

CONSIDERATION OF LOVE AND AFFECTION, IN DEED, will support an inheritance.

REAL ESTATE MAY BE CONVEYED BY INSTRUMENT WITHOUT SEAL, under the code of Iowa.

USE IS INHERITABLE ESTATE UNDER IOWA CODE.

CONDITION IN DEED OF LAND, THAT IF GRANTEE DIE WITHOUT CHILDREN living at the time of her decease the land shall revert to the grantor, is fulfilled by the grantee's dying leaving one child surviving her, and the estate conveyed will pass to the heir of the child after its death.

BILL in chancery. In 1851 the complainant and his wife conveyed the land in question, by a deed made in consideration of love and affection, to their daughter who was then the wife of the defendant Armstrong, "to have and to hold the same to her, the said Ellen, and to her own proper and legal heirs forever; nevertheless, upon this condition, that should the said Ellen die without children living at the time of her decease, then and in that event the said lot of ground hereby conveyed shall revert and return to us and our heirs, in the same manner as if this conveyance had not been made." Ellen Armstrong, the grantee, died about twenty-one months after the date of the deed, leaving an infant child which died about seven days after the mother. The complainant claimed the lot by reversion and the defendant by descent from the child. The bill alleged that it was Pierson's intention so to convey the lot that Armstrong could in no event acquire it; that this intent was stated to the attorney who drew the conveyance; that both the grantee and her husband knew it and concurred in it. The bill prayed that Pierson be quieted in his title to the premises and have restitution thereof, and for an account of rents and profits, and for general relief. The defendant demurred on two grounds: 1. That the petition showed no equity on its face; 2. That the petition showed the legal title and possession to be in the defendant, and no equitable right in the complainant. The district court sustained the demurrer, and, the complainant declining to amend, dismissed the bill. Other facts appear from the opinion.

James Green, for the appellants.

David Rorer and J. C. Hall, for the appellee.

By Court, WOODWARD, J. It must be remarked in the outset that neither Ellen, the daughter, nor Armstrong, the husband,

are alleged to have had any voice, hand, or part in procuring the gift of the lot, nor in the making of the deed, or the manner in which it was made. The gift appears to have been entirely a gratuity of the father, and the manner of it altogether his and his attorneys. It is not altogether clear what the bill is in its nature, whether a bill to correct a mistake or to quiet a title. If it is the latter, however, still it is to quiet it on account of a mistake. The cause has been argued mainly as an application in chancery to correct a mistake. The complainant and appellant claims relief upon two grounds: 1. That the deed is not sufficient to carry the fee; 2. That if it is, there was a mistake in the draughtsman in not effecting the intention of the grantor.

We will view the case first upon the second ground, supposing the deed sufficient to carry the fee. The grantor intended that on the death of Ellen and her children without issue the title should revert, but it has descended from the child to its father. Here is a mistake as to the legal effect of the deed. Is it a mistake of fact or of law? It seems difficult to distinguish it from one of law; and whether of fact or of law, can relief be granted? The maxim, *Ignorantia legis non excusat*, is stated throughout the books as an elementary proposition; and when you look for the doctrine of law on this subject, you find it to be that equity will not relieve against a mistake of law. And Mr. Story says that the present disposition of courts of equity is to narrow, rather than to enlarge, the operation of exceptions: See 1 Story's Eq. Jur., secs. 111-120, 125, 137, 138. The supreme court of the United States says: "The question then is, Ought the court to grant the relief asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character:" *Hunt v. Rousmaniere*, 1 Pet. 1. This case will be referred to again more fully. A statement of it is found in 1 Story's Eq. Jur., sec. 114; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Lyon v. Richmond*, 2 Id. 51, 60; *Storrs v. Barker*, 6 Id. 166, 169 [10 Am. Dec. 316]; *Champlin v. Layton*, 6 Paige, 189. These books will lead to others. Many comments might be made upon these authorities and those which follow, but it would occupy too much time and space. We will, however, refer to some which are often referred to, with a brief notice of the distinctions and grounds on which they stand.

Two are bound by a bond, and the obligee releases one, supposing by mistake of law that the other will remain bound. The obligee was refused relief: 1 Story's Eq. Jur., secs. 112-116, 134-137. In sections 140 to 156, Mr. Story takes up mistakes of fact, in which relief is usually granted, and in sections 152 to 156 he treats as mistakes of fact the cases of written agreements by mistake, containing less or more than, or something different from, what the parties intended; and in some of those sections speaks of mistakes of a draughtsman. On all the branches of this subject there has been some confusion, and probably some conflicting cases, but the law, as we conceive it now to stand, is best summed up in *Hunt v. Rousmaniere, supra*. The court in that case says: "There are certain principles of equity applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draughtsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." Again, p. 16: "It is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law; but we mean to say that when the parties, upon deliberation and advice, reject one species of security and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension and the insufficiency of such security, in consequence of a subsequent event not foreseen perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon."

We must here remark, that in the above authorities, and in the cases generally, mutuality forms an important element; and although the cases sometimes arise upon an instrument signed but by one, yet that instrument arises out of, and is the expression of, the agreement of two minds. Now, in the case before us, is not the deed the intended expression of but one mind, and that the mind of the grantor? and should not this fact have some weight in the case? It is true that the grantor says the others so understood it, both before and after execution;

but what if they did? They are not said to have sought or procured the gift, or the making of the deed; it was a free gift on his part, and he got it up in the manner which best suited himself. The daughter took only just what he pleased to give, and in such a manner as he pleased to give it, and had not a word to say about it. True, she understood it just as her father and his attorney explained it, but there was no agreement between them, in the sense of contract. And as to Armstrong, he had nothing to do with it; it was intended to exclude him; he stood outside; he was an alien to the transaction; and the terms "agreement" and "mutuality" have no application to him. The mistake, if there was one, was in not anticipating further probable or possible events. The attorney provided for the duration of two lives, we will say, that is, of the daughter and her children; he thought that sufficient, and went no further. He did not provide for the contingency of the daughter's issue being cut off.

Let us now look at some of the cases usually cited in view of the above law and these facts. A full statement of *Champlin v. Layton*, 6 Paige, 189, would require too much space; but the hinge upon which it turns lies in these words of the chancellor: "The representation of Herring was tantamount to a declaration on the part of the vendors that neither they nor those under whom they claimed had dedicated the lot in question to the public, nor done any other act by which the corporation, or the owners of the adjacent land, would have a right to open a street over the lot without paying the owner the full value thereof. This declaration of Herring amounted to a misrepresentation in point of fact." This indicates the ground upon which relief was granted to the purchaser of the lot.

The case of *Gouverneur v. Titus*, 6 Paige, 847, was thus: A. sold to B. the north-east corner of a tract of land; but by mistake in the deed described it as the north-west corner. Subsequently to this C. recovered judgment against A. before the mistake was discovered, which judgment was a lien by law. B. then conveys to others by the same erroneous description. C. then buys under his judgment, and a levy made with the knowledge of the mistake. A. and B. at some point of time made a new deed to B.'s vendees, correcting the error. These subsequent purchasers under B. seek relief against C., and the relief is granted. Here was a clear mistake of fact, with notice, and observe by whom the application was made.

The case of *Edwards v. Morris*, 1 Ohio, 531, is said, in 11

Id. 231, to have been a case of mistake of fact, and not of law. In *McNaughien v. Partridge*, Id. 232, one partner gave a sealed instrument for the debt of the firm, with the knowledge and assent of the other partners, and under the supposition and intention of them all that all should be and were bound. The obligee alleged that Hale, the partner who executed the bond, was insolvent, and had gone to parts unknown, and prays relief against the other partners. It was considered that the other partners were discharged in law by the higher security given by Hale, and which bound him alone. Wood, J., giving the opinion of the court, reasons as though relief should be given, although it was a mistake of law. Yet he says: "I do not know that I am authorized by a majority of my brethren to say that a mere mistake of law may be corrected; but I am authorized to say that relief might be granted in the case at bar if it depended on the case of mistake made in the bill." The case was ultimately decided upon another ground. The case of *Evants v. Strode*, Id. 480 [38 Am. Dec. 744], is more strongly in favor of the present complainant. Evants took from Strode a written agreement for the sale of some land by warranty deed. Strode died, and his administrator filed a bill in the proper court, to obtain authority to make the conveyance. The court decreed the conveyance by warranty deed. The administrator made a deed, but by mistake, or for some other cause, omitted to insert a clause of warranty. The purchaser was ousted, and brought his bill against the administrator and heirs at law of Strode for relief. The court distinctly call this a mistake of law, and grant relief. They cite, in addition to the cases above, *Drew v. Clarke*, Cooke, 374, 380; 1 Hill's Abr. 146; *Fisher v. May*, 2 Bibb, 449 [5 Am. Dec. 626]; *Rucker v. Howard*, Id. 168; *Brown v. Armistead*, 6 Rand. 594. Three things are to be noticed in this case: the decree of the court below was that the conveyance should be by deed of warranty; the purchaser had paid his money for the land; and there was a prior contract which was to be affected by the deed. In the case at bar, these things do not exist. The code of Iowa, section 240, has manifestly no relation to this case. *Arnold v. Grimes*, 2 G. Greene, 80, in its own features, has no bearing upon the case before us, and the *dicta* quoted from *Belcher v. Belcher*, 10 Yerg. 121, applies too loosely to avail much amid so much that is adjudication.

The case of *Warburton v. Lauman*, 2 G. Greene, 420, is much like that of *Gouverneur v. Titus*, 6 Paige, 347. B. mortgaged lot 18 to L. by mistake, intending lot 8; afterward B. mortgaged lot

8 to W., who had notice of the mistake. L. asks relief against W., on the ground of mistake and notice, and it is granted. These cases and references include all those cited by counsel. We will now refer to two or three which seem to settle the case before us. "Two are bound by a bond, and the obligee releases one, supposing by a mistake of law that the other will remain bound." Story says: "The obligee will not be relieved in equity, upon the mere ground of his mistake of the law; for there is nothing inequitable in the co-obligor's availing himself of his legal rights, nor in the other obligor's insisting upon his release, if they have both acted *bona fide*, and there has been no fraud or imposition on either side to procure the release." "So where a party had a power of appointment, and executed it absolutely, without introducing a power of revocation, upon a mistake of law, that being a voluntary deed, it was revocable, relief was denied:" 1 Story's Eq. Jur., sec. 112.

In *Hunt v. Rouesmanier*, 8 Wheat. 174, 216, S. C., 1 Pet. 1, the facts were these: R., borrowing money of H., was willing to give him any security he chose, by lien or otherwise, on the brig Nereus and the schooner Industry. H. consulted counsel, who advised to take a power of attorney to sell the vessels, as this would avoid the necessity of changing the vessels' papers and of taking possession of them on their arrival in port. This was intended to be, and was believed to be, as full and perfect security as would be given by a deed of mortgage. The power was irrevocable in law, but B. died, and his death terminated it. The bill was filed against B.'s administrator. The defendant demurred. Marshall, C. J., in his remarks, says: "In this case there is no ingredient of fraud. * * * The instrument taken is the instrument intended to be taken; but it is contrary to the expectation of the parties, extinguished by an event not foreseen nor adverted to. Does a court of equity in such a case substitute a different instrument for that which has failed to effect its object?" Again: "We find no case precisely in point, and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief." He overrules the demurrer, but as there are creditors concerned, permits the defendants to withdraw their demurrer and answer over. This case is cited on both sides of the question, whether chancery will relieve against a mistake of law. And certainly it is not a clear case. The same case comes up again in 1 Pet. 1. In this it appears that the former bill had

been answered under the leave given by Marshall, C. J., testimony taken, and a hearing had in the circuit court, which finally dismissed the bill. On appeal, the supreme court of the United States affirmed this decree. This case goes the furthest in support of that at bar, and yet decides against it. There was a clear mistake as to the effect of the instrument; there was a pecuniary consideration involved; there were two parties agreeing what should be effected, and what was intended; and yet the highest tribunal in our land refuses the relief asked. And this decision is cited with approbation in *Bank of United States v. Daniel*, 12 Id. 55.

We think, therefore, that to grant the relief sought in the case at bar would be going, not only beyond any case where it has been granted, but against those in which it has been refused. We do not undertake to lay down any proposition of law, any further than those we have quoted, and particularly those from *Hunt v. Rouxmanier*, 1 Pet. 18. But although this part of the case is decided without this further thought, we cannot avoid expressing the strong inclination of our minds that some weight ought to be given to the fact that the defendant is an entire stranger to the original transaction, having no voice nor hand in its inception or maturity, and that all that he now has in it is cast upon him by the law, he taking only by descent from his child, and that taking by descent from its mother. The complainant having chosen his own instrument and mode for exercising his liberality, we cannot make a new instrument for him, but must leave him to its legal effect.

And to this branch of the case we come now. It is said that the deed is not sufficient to pass the estate, and that the condition of it has not been fulfilled. 1. It is said that the deed did not pass the estate, because the words "have given and granted" will not have that effect. Counsel present this and the following objections seriously, and we will consider them, and examine the books referred to by him. 1. The words are in the past tense: Toml. Law Dict., verb. Grant. Grants are usually made by these words: "have given, granted, and confirmed." Mr. Walker, in his Introduction, 377, says: "The statement of the conveyance in the past and present tenses, 'has given' and 'does give,' etc., is an insult to common sense. Either tense is sufficient." 2. Counsel urges that the words "give" and "grant" are not appropriate to convey the land, and dwells principally on the word "grant" as appropriated to incorporeal property only. Let us drop this word, then, as carrying only the

incorporeal qualities of the estate, and take up the word "give." This at common law passed an inheritance, a fee, although it was appropriate to a fee-tail. But this deed does not present the line in which the estate shall pass, and we must look at the *habendum*, for this will lessen, enlarge, explain, or qualify the premises. The *habendum*, then, is "to her and her own proper and legal heirs forever:" 4 Kent's Com. 468; Walk. Introd. 380. The daughter dying left the child her heir, and the child dying left its father as heir. This is in the regular line of "her heirs." But counsel mistake in thinking that the word "give" was not at common law a sufficiently effective word when not limited to an estate-tail: Toml. Law Dict., tit. Conveyance; Walk. Introd. 377; 4 Bac. Abr. 76, 77, 82. The latter says: "The words *dedi* and *concessi* are general words, and may amount to a grant, feoffment, gift, release, confirmation, surrender," etc. 2. The counsel hold that the consideration of "love and affection" will not support an inheritance. For the contrary, see 4 Kent's Com. 462; 1 Story's Eq. Jur., sec. 168; Code of Iowa, sec. 975. 3. The counsel maintain that the instrument (or deed) could not operate as a covenant to stand seised to uses, there being no seal to it. The seal on private instruments had become a pure and useless technicality. The code of Iowa in 1851 abolished the use of them on private instruments, by declaring it to have no effect, and providing that all written contracts should import a consideration. The same statute, in its provisions relating to the transfer of real estate, does not require a seal, and applies the word "deed" in the statute to an instrument conveying lands, and says that it does not imply a sealed instrument: See sec. 26, pt. 20, 974, 975. We understand that real estate may be conveyed, and by an instrument without a seal, and that all its qualities and incidents will pass without that heretofore important thing, a seal or scrawl. 4. As the court below may probably have held that this deed could receive effect as a covenant to stand seised to uses, if in no other view, the counsel here maintain that the defendant could not inherit a use; and he refers to the code, section 1408, which, relating to decedent's estates, says that "the remaining estate of which the decedent died seised shall, in the absence of other arrangements by will, descend in equal shares to his children." Then the counsel argues that a use is not an estate. By the code, section 26, part 8, the word "land" and the phrases "real estate" and "real property," in the statute, include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal. By sec-

tion 26, part 10, the word "property" includes personal and real property; by section 1201, "every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used;" by section 1408, "the remaining estate of which the decedent died seised shall descend in equal shares to his children;" and by section 1410, if the intestate leave no wife (or husband), nor issue, "the whole shall go to his father." These provisions would seem to embrace a use, and to make it inheritable; and more, was not a use descendible at common law? See 2 Bla. Com. 330; 4 Kent's Com. 492; Prest. on Est. 143; 1 Cru. Dig. 323; 2 Thomas' Co. 705, 672; 7 Bac. Abr. 77; Sand. U. & T. 63, 66, 165; 1 Hill's Abr. 226; *Modisett v. Johnson*, 2 Blackf. 434. We incline to the opinion, therefore, that if this was only a covenant to stand seised to uses, and the use was executed in the mother, then it descended to the child, and to the child's heir, who was its father.

These legal points have not been argued at all on the one side, but we have felt ourselves obliged to notice them, wishing, however, that if they were really relied upon, they might have received a more careful and thorough attention. When a question like the above, relating to the words "given and granted," or that concerning the consideration of "love and affection" supporting an estate of inheritance, comes up, the doubt naturally arises whether "there now remaineth to us" any of this law. Have we not passed by it, and got beyond it? We have not the various estates formerly known in England, with their complication of law. We have no occasion for their former distinction of conveyances. We, in general, own our land in simple absoluteness, and need not talk of *allodium*, or free and common socage. Saving the rights of creditors and subsequent *bona fide* purchasers, we enjoy the right to do with it what we please; not merely to sell it, but to give it away. If a deed is without any consideration, what matters it between grantor and grantee, and their heirs? Has not the grantor the same right to give away his lot that he has to give his horse or his watch? Is it not the intent and tone and spirit of all our laws and institutions and tenure of lands, that the latter may be conveyed by any words which manifest that purpose, and for any consideration we please, so that others having legal or equitable claims upon us are not injured? These questions naturally arise, though they are not presented for formal adjudication: Walk. Introd. 377.

But appellant and complainant presents one other matter,

which is more serious in its nature. Supposing this deed to convey a fee-simple, it is followed in the same instrument by a condition of defeasance. Should the said Ellen die without children living at her death, the estate is to revert. Is the estate saved by her leaving one child living? Complainant's counsel cite 2 Fearne on Remainders, 377; 1 Story's Eq. Jur., sec. 288; Story on Cont., sec. 561; the last two of which say that a condition precedent must be strictly performed. But this is a condition subsequent, which is not held up so rigidly: 2 Toml. Law Dict., tit. Condition; of performance in substance and effect: Id. 3. No authority seems to be of weight unless it is upon the use of the particular word "children," and of these we are referred to none, and can find but very few. Bouvier's Law Dict., verb. Plural, says: "Sometimes, however, it may be so expressed that it means only one, as if a man were to devise to another all he was worth, if he, testator, died without children, and he dies leaving one child, the devise would not take effect;" for which he refers to the civil law, etc. So on the word "singular," he says it frequently includes the plural, as a bequest to "my nearest relation" is to all in the same degree. So a bequest to "my heir," by one having three heirs, is extended to all. The word "heirs" is never construed as requiring more than one. A gift or devise to one "and his children" would not be held to call for a plurality, but what estate it would give is not material. It is worthy of note that this deed is to her and "her heirs," provided, etc.; and then will the word "children" restrain the word "heirs"? And even the bill seems to give a construction, when it uses the language, "and in such manner as that at the death of said Ellen, and upon failure of children as aforesaid, and heirs of her body to enjoy the same, said grant should cease," etc. This view is favored also by the case of *McGregor v. Toomer*, 2 Stroh. Eq. 57. The case of *Glass v. McCloud*, decided by this court, also bears upon similar questions. The object of this gift would seem to apply to one child, as well as to several. The language must be taken to mean the same as if it was, "if the said Ellen die without any children living," etc.

The judgment of the district court is therefore affirmed, but the cause will be remanded, with leave to the complainant to amend, if he sees cause.

MISTAKE OF LAW, WHETHER EQUITY WILL RELIEVE AGAINST: See *Dill v. Shahan*, 60 Am. Dec. 540, note 543, where other cases are collected. The principal case is cited in *Scholte v. Rosiers*, 4 Iowa, 331, and in *Wilkinson v. Getty*, 13 Id. 159, to the point that equity will not correct a mistake of law.

The principal case is cited in *City of Burlington v. Gilbert*, 31 Id. 368, to the point that mutuality is an important element entering into such mistakes as will be corrected by a court of equity.

IGNORANCE OF LAW IS NO EXCUSE OR DEFENSE: See *State v. McIntire*, 59 Am. Dec. 566, note 572, where other cases are collected; *Lucas v. Hart*, 5 Iowa, 422, citing the principal case.

IN IOWA, DEED TO A. B. IS DEED TO HIM AND HIS HEIRS AND ASSIGNS: *Karmuller v. Krotz*, 18 Iowa, 358, citing the principal case.

WORD "HEIRS" IS NECESSARY IN DEED TO PASS FEE-SIMPLE: See *Rector v. Waugh*, 57 Am. Dec. 251, note 257; *Leitensdorfer v. Delphy*, 55 Id. 137. But see *Gould v. Lamb*, 45 Id. 187, note 190.

OMISSION OF SEAL IN DEED, EFFECT OF: See *Floyd v. Ricks*, 58 Am. Dec. 374; *Bryan v. Stump*, 56 Id. 139; *Beardisley v. Knight*, 33 Id. 193. A seal is not necessary to the validity of a conveyance of land in Iowa: *Simms v. Harvey*, 19 Iowa, 290, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Stout v. Merrill*, 35 Iowa, 58, to the point that in Iowa every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be readily inferred from the terms used; and in *Thornton v. Mulquinne*, 12 Id. 558, to the point that lands may, in Iowa, be conveyed by any words which manifest the purpose to convey, and for any consideration that the parties please, so that others having legal or equitable claims are not injured.

WALTERS v. WASHINGTON INSURANCE CO.

[*1 Iowa, 404.*]

POLICY OF INSURANCE IS, AFTER LOSS HAS HAPPENED, ASSIGNABLE like any other debt, although such policy contains a provision that it shall not be assignable without the consent of the company expressed by indorsement made thereon.

UNDER ANSWER CONTAINING GENERAL DENIAL OF INDEBTEDNESS, and plea of payment, a judgment of garnishment against the defendant cannot be given in evidence. Such matter is special matter in avoidance, and not negativing the original indebtedness, and must therefore be specially pleaded.

THOUGH RULE OF COURT MAY MAKE GENERAL DENIAL SUFFICIENT denial of the averments of the petition, it cannot extend further than as a denial of the petition, and cannot open the door to special defenses and matter in avoidance.

PRIMARILY, GARNISHEE IS REGARDED AS INNOCENT PERSON owing money to or having in his possession property of another, without fault or blame, and he is supposed to stand indifferent as to who shall have the money or property.

BY STATUTE OF IOWA, ISSUE MAY BE TAKEN ON ANSWER OF GARNISHEE, but if such issue is not taken, his answer is the sole test of his indebtedness or liability.

GARNISHEE'S RIGHTS SHOULD BE CAREFULLY PROTECTED. He is to be charged only upon his contract, or relation with his creditor, precisely as it exists between them, and is in no case to be placed in a situation where

he will be compelled to pay the debt twice, or where he will be unnecessarily exposed to litigation and expense.

ASSIGNEE OF UNNEGOTIABLE DEBT SHOULD GIVE NOTICE of the assignment to the garnishee, summoned as the debtor of the principal debtor, in time to enable him to show such assignment in his answer, or at least before judgment against him. If, having such notice, he neglects to show it in defense, he cannot resist a subsequent claim by the assignee; but if he does show it, he cannot be charged as garnishee.

WHERE ASSIGNEE OF UNNEGOTIABLE INSTRUMENT FAILS TO GIVE NOTICE of the assignment to the debtor until after judgment of garnishment for the debt has been rendered against him, the garnishee is relieved from liability to the assignee.

APPEAL from the Lee district court. The opinion states the case.

Claggett and Dixon, for the appellant.

Edwards and Turner, for the appellee.

By Court, WOODWARD, J. Dr. Charles Walters held a policy of insurance executed by the defendants on a lot of medicines, and the plaintiff held a policy of the same company on the office building in which the medicines were kept. Charles Walters assigned his policy to the plaintiff on the twentieth of November, 1854. A loss took place before the assignment. The policy "agreed to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss," etc. It also contained this provision: "Policies of insurance subscribed by this company shall not be assignable without the consent of the company expressed by indorsement made thereon." The plaintiff brings suit to recover fifty-five dollars, the balance due on the policy of Charles Walters, and assigned to her.

The defendant pleads: 1. A general denial of all the allegations of the petition; 2. That there had been "a settlement in full," by payment and receipt, given by plaintiff to defendant, in full of all claim or demand growing out of said insurance mentioned in plaintiff's petition. The general denial of the petition is allowable under the rules of the first district, and includes in this case a denial of the indebtedness. Under this general denial arose the question whether the policy was assignable after loss, and consequently, whether the plaintiff could maintain her action. The court instructed the jury that the policy was not assignable, and that the plaintiff could not recover. To this the plaintiff excepted, and this is the first question before us.

It would be impossible to hold the policy a negotiable instrument under the code, section 950, by virtue of the words "execu-

tors and assigns," inasmuch as it afterwards contains an express prohibition of assignment. And it is not necessary to determine whether it would be assignable before loss, under sections 949 and 954 of the code. But the question for determination is, whether the policy is assignable after loss. There are reasons of sufficient force why insurers should prohibit the assignment of their contracts of insurance. The use to which the insured property may be likely to be put has great weight, and even personal confidence is of avail. Until a loss has occurred, the liability is contingent; there may never be a liability. But when the loss has happened, reasons of the character of those above stated lose their force. The liability is fixed. There is now a debt, and no reason is perceived why this, like any other debt, should not be assignable. Without any detriment to the insurer, the statute may be allowed to have its legitimate effect. By such a course the insurer is not barred of any defense which he may have against the insured, but he may defend against the assignee as fully as he might against the insured; whilst if there is no defense, and the money is due, there is no sufficient reason why the assignee should not recover it. The better view is to regard the policy as assignable after the loss has happened: Code, secs. 949, 951. The like ruling has been made in New York, on a policy containing precisely similar provisions, in the case of *Brichta v. New York Lafayette Ins. Co.*, 2 Hall, 372.

Under that branch of defendant's answer which alleges payment, and receipt given by plaintiff in full of all claim or demand growing out of said insurance mentioned in plaintiff's petition, the company gave in evidence a receipt of plaintiff on her own policy, on which also at the same time a loss occurred, and further put in evidence Charles Walter's receipt for the loss under his policy; but on the other hand, defendant's certificate was put in evidence, showing that they held fifty-five dollars of the amount received to them by Charles Walters, "subject to such garnishment," and "to be applied as may be finally decided." This latter takes away the pretense that they had paid. They also showed by proper evidence that on the seventh of December, 1854, and before defendants or their agents, Edwards & Turner, had notice of the assignment of Charles Walters's policy to the plaintiff, one Curtis and one Oswald & Co. severally recovered judgment against said Charles Walters, and against defendants as his garnishees. The plaintiff requested the court to instruct the jury that the defendant could not give said judgment of garnishment in evidence under

their answer; that they could not do this under a general denial of indebtedness, but that they must plead the matter. The court refused to give this instruction.

At this point of the cause and the evidence, the defendant committed the error of a departure from the pleadings. This matter offered by the defendant was special matter, and very clearly could not be introduced under a general denial, nor under either part of his answer. It was matter in avoidance, and not negativing the original indebtedness. Admitting that a rule of court is competent to render a general denial a sufficient denial of the averments of the petition, still it can extend no further than as a denial of the petition, and cannot open the door to special defenses and matter in avoidance. In this the court erred. Nearly all the instructions asked by both sides related to this portion of the defense, and therefore under the above views the questions raised in them need not be discussed.

Another question has been fairly raised and presented, which may arise again, and it is therefore proper to be considered, although it is not necessary for the disposition of the cause as now before us. The policy was assigned on the twentieth of November, 1854. On the seventh of December, 1854, Curtis and Oswald recovered their judgments against Charles Walters, defendant, and the insurance company as garnishee. It does not appear when the garnishment was served on the defendants, and therefore the date of the judgment must be taken; and as these suits were before a justice of the peace, the service may well enough have been after the assignment. This present suit was commenced on the twenty-first of August, 1855. The defendant has not yet paid the money to Curtis and Oswald, the creditors in the garnishment.

The question is whether the plaintiff or the creditors by garnishment have the prior or superior claim to this money in the hands of the garnishee, the plaintiff having given the company no notice of the assignment of the policy to her. The code, section 949, makes a large class of instruments, under which this policy would probably fall, assignable, and gives the assignee a right of action in his own name, subject to any defense or set-off, legal or equitable, which the maker or debtor had against the assignor before notice of his assignment. And by section 951, when by the terms of an instrument its assignment is prohibited, the assignment is nevertheless valid, but the maker may set up any defense which he may have before the suit is commenced. This question has been looked at in different

points of view, and the decisions are not reconcilable. Sometimes it has presented itself under the imposing difficulty of the conflict of laws. Sometimes the garnishment debtor has been received and treated as a trustee. Again, the question has been treated as one of priority of lien only as under attachment or judgment. Under these different positions, or viewing the subject, different decisions have been made. But it would seem as though there were some views of the proceeding and the party garnished which ought to stand prominent in the consideration of the subject. Primarily, the garnishee is taken to be an innocent person, who is called into court as owing money to another, or as having property of that other in his hands, and in either case without fault or blame. It is true that this process may be, and sometimes is, used as a powerful instrument for ferreting out fraud, or the concealment of property. But the proceeding is based upon the idea of innocence in the party summoned. He is supposed to stand indifferent as to who shall have the money or property. His answer is generally the only evidence of his indebtedness or liability. By the statute of this state an issue may be taken on his answer, but if such issue is not taken, the answer remains the sole test of his being indebted or holding property. His rights are to be carefully protected; he is to be charged only upon his contract or relation with his creditor precisely as it exists between them; he is in no case to be placed in a situation where he will be compelled to pay the debt twice: Drake on Attachment, sec. 626. And it is apprehended that he is not to be unnecessarily exposed to litigation and expense. In view of these and such considerations, it does seem that the garnishee should not be tried merely by the rules of prior liens, or of attachment or judgment liens, or of debtors' assignments for their creditors, or of trustees even. Nor, perhaps, when all the parties are within our own jurisdiction, is his case to be wholly measured by the rules bearing upon cases within the conflict of laws.

The true rule in relation to one summoned as the debtor of the principal debtor on an unnegotiable debt is that the assignee of the debt should give notice to the garnishee, of the assignment, in time to enable him to show such assignment in his answer, or at least before judgment against him. Having received such notice, if he neglect to show it in defense, he cannot resist a subsequent claim of the assignee; and on the other hand, having shown such assignment, he cannot be charged as garnishee. This is the rule which has been applied to debtors by instruments

which were held not assignable in law, but only in equity so as to enable the assignee to sue in the name of the assignor. And what different rule should be applied to assignees under the above sections of the code? In the one case, the debtor is entitled to every defense existing before the assignment; and in the other, to all existing before suit brought; and it is immaterial under which of these sections this case is classed. This subject is fully explained and the rule enforced in Drake on Attachment, secs. 569 et seq., 614 et seq., and 626, and the context; and see Story's *Confl. L.*, new ed., sec. 396, and p. 328, 230, former ed.; *Wood v. Partridge*, 11 Mass. 489; *Hull v. Blake*, 13 Id. 153; *Foster v. Sinkler*, 4 Id. 450; *Dix v. Cobb*, Id. 508; *Jones v. Witter*, 13 Id. 304; *Holmes v. Remsen*, 4 Johns. Ch. 460 [8 Am. Dec. 581]; *Muir v. Schenck*, 3 Hill (N. Y.), 228 [38 Am. Dec. 633]; *Clodfelter v. Cox*, 1 Sneed, 330 [60 Am. Dec. 157].

Under a law and system of garnishment, this is the only rule which will fully protect the rights of all parties, and save garnishees from being involved in suits and expenses to which the honest ought not to be made subject; and this rule is intelligible, easy, and practicable, determining the respective rights at an early period, instead of allowing the questions relating to them to extend indefinitely into an uncertain future. In the case at bar, it is not asserted that the plaintiff gave notice of the assignment to the company before judgment was rendered against it. This judgment must be held as final. It would seem unjust to hold the garnishee still liable to the assignee, and compel him to go into chancery, or to resort to any other legal proceeding, to protect himself against that judgment, in relation to which he has been in no fault. A notice from the assignee would have saved her debt, and at the same time protected the company.

The judgment must be reversed, and a *procedendo* issue.

WRIGHT, C. J., concurred.

DEBTOR IS NOT AFFECTION BY ASSIGNMENT OF HIS CREDITOR'S CLAIM until he has notice thereof: See *Smith v. Ewer*, 60 Am. Dec. 73; *Gaulagher v. Caldwell*, Id. 85, note 87, where other cases are collected; *Clodfelter v. Cox*, Id. 157, note 180. The assignee of a debt should give notice to a garnishee of the assignment in time to enable the latter to show such assignment in his answer, or at least before judgment against him. If the assignee fails to do this, and judgment is rendered against the garnishee, such judgment will be a bar to any subsequent suit on the debt: *Seavers v. Wood*, 12 Iowa, 300; *Yocum v. White*, 38 Id. 290; *Wigwall v. Union Coal & M. Co.*, 37 Id. 130, all citing the principal case.

IF GARNISHEES HAVE NOTICE BEFORE ANSWER, and neglect to show it in defense, he cannot resist a subsequent claim of the assignee; and having shown it,

he cannot be charged as garnishee: *Allison v. Barrett*, 16 Iowa, 233; *McPhail v. Hyatt*, 29 Id. 141, both citing the principal case; and see *Richards v. Griggs*, 57 Am. Dec. 240, note 242. The rights of the holder of a promissory note, who received the note before garnishment, are not affected thereby: *Fowler v. Doyle*, 12 Id. 536, citing the principal case. Rights of garnissees are to be carefully protected: *Burton v. Warren*, 11 Id. 169, citing the principal case.

RIGHTS OF GARNISHEE: See *Webb v. Miller*, 57 Am. Dec. 189, note 191, where other cases are collected: *Richards v. Griggs*, Id. 240.

ASSIGNMENT OF INSURANCE POLICY: See *New York etc. Ins. Co. v. Flack*, 56 Am. Dec. 742, note 747, where the subject is discussed at length. The assignment of a policy of insurance after loss is equivalent to the assignment of the debt created and matured by the loss: *Carter v. Humboldt etc. Ins. Co.*, 12 Iowa, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Stevens v. Pugh*, 12 Iowa, 432, to the point that if A. is indebted to B. on a promissory note overdue, C., in a suit against B., may garnish A., and hold him liable if the note was assigned between the service of the garnishment and the answer, and A. had knowledge of the fact.

CHARLESS v. LAMBERSON.

[I IOWA, 436.]

TO CONSTITUTE HOMESTEAD, UNDER IOWA ACT OF 1849 EXEMPTING HOMESTEAD from forced sale, there must have been both ownership and occupation of the premises during the existence of that law.

OCCUPATION REQUIRED TO CONSTITUTE HOMESTEAD must be something more than a constructive possession, or than such possession as arises when land is cultivated, or is being fenced and improved. The premises become a homestead when they are used for the purpose designed by the law, that is, as a home for the family, and not before.

INTENTION OF OWNER OF LAND TO MAKE IT HIS HOMESTEAD, formed while the homestead act of 1849 was in force, and carried into effect by moving on to the premises after the repeal of that act, is not sufficient to exempt the property as a homestead.

WHILE STATUTES GRANTING EXEMPTIONS SHOULD BE SO CONSTRUED as to carry out the liberal and benevolent policy of the legislature, parties claiming their benefits must bring themselves at least within the spirit of their provisions.

CODE OF IOWA WENT INTO EFFECT ON JULY 1, 1851, and not at the date of its passage and approval; and the words "prior to the passage of this law," employed in section 1249, are in effect the same as if the word "heretofore" had been used, and either expression must relate to the time of taking effect, and not to the time of passage.

ACTION to recover a lot in the city of Keokuk. The defendant bought the lot in 1848. It remained vacant until the spring of 1851, when he commenced to build a house on it, intending to make it his home. On the seventh of July, 1851, he moved into the house. In the early part of May, 1852, the plaintiffs

recovered a judgment against the defendant, on which execution issued, under which there was a sale of the premises at which the plaintiffs became the purchasers. They obtained a sheriff's deed in 1853. Other facts appear from the opinion.

Claggett and Dixon, for the appellants.

Moss and Marshall, for the appellee.

By Court, WRIGHT, C. J. Several errors are assigned, upon which we are asked to reverse this judgment; but they all involve the construction of the homestead act of 1849, and so much of the code as relates to the same subject.

The first section of the act of the fifteenth of January, 1849, entitled "An act to exempt a homestead from forced sale," provides as follows: "That a homestead consisting of any quantity of land not exceeding forty acres, used for agricultural purposes, and the dwelling-house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any recorded town plat or city or village; or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one fourth of an acre, being within a recorded town plat or city or village, and the dwelling-house thereon, and its appurtenances, owned and occupied by any resident of the state, shall not be subject to forced sale on execution, or any other final process from a court, for any debt or liability contracted after the fourth day of July in the year 1849; provided, that the value of such exempted homestead or town lot and dwelling thereon shall in no case exceed the sum of five hundred dollars."

The first question for our determination is, whether the property was exempt from execution under the above-recited statute. In order to be so exempt, the contract must have been made after the fourth of July, 1849. It was so made, and therefore, so far the property was not liable. By the law, the extent of it is also limited; but as it is not pretended that the lot in controversy exceeded the quantity allowed, no question arises on that part of the law. The homestead must also be "owned and occupied;" and here is the point of controversy between the parties. The plaintiff claims that the homestead must have been owned and occupied at the time of the making of the contract, and that ownership at the time and subsequent occupancy will not exempt it; but that if this is not true, there must, at least, have been the concurrence of both before the code took effect, and the law of 1849 became inoperative. The

defendant claims that the contract, being made under the law of 1849, entitled him to claim the exemption, without reference to the time of occupation, provided he so occupied the premises at the time of judgment, levy, or either. Taking it for granted, for the present, that there was no occupation until the defendant moved into the premises on the seventh of July, 1851, had he acquired a homestead so as to claim it as exempt under the law of 1849? And this question we feel constrained to answer in the negative. To constitute a homestead, there must have been, in our opinion, not only ownership, but occupation, both concurring, during the existence of that law.

The first law of our state (then territory) that looked to the qualified exemption of a homestead was passed January 25, 1839. By that law the homestead is spoken of as "the messuage, lands, or tenements on which such defendant or defendants may be chiefly situated." This qualified exemption was continued by the law of 1843, that statute having the same descriptive language as above quoted from the law of 1839. These were succeeded by the law of 1849. It will be observed that the statute of 1839, followed by the law of 1843, contemplates occupation—the being "chiefly situated" on the land—as essential to give the party the qualified exemption. Under the law of 1849, however, the word "occupied" is substituted for the words "chiefly situated," and in legal acceptation may be regarded as alike restrictive. By the code, it must "embrace the house used as a home." Occupation, then, whether spoken of as the lands where defendant is "chiefly situated," or as "the house used as a home," would appear to have been, by all our legislation on this subject, essential to constitute a homestead. With the policy of the requirement we have nothing to do, such considerations being addressed alone to the law-making power. If we had, we can see many and controlling reasons for it. The law is based upon the idea that as a matter of public policy, for the promotion of the property of the state, and to render independent and above want each citizen of the government, it is proper he should have a home—a homestead—where his family may be sheltered, and live beyond the reach of financial misfortune, and the demands of creditors who have given credit under such law. If such house is not to be occupied, and need not be, in order to give the exemption, then the reason of the law entirely ceases. That he may claim as exempt lands and houses, and yet not occupy them as a home, will not do, because the reason of their exemption is that he may have such as he

has selected by residence, and what are regarded as necessary for the happiness and well-being of the family. To say that he owns the land, and designs in time to build his residence thereon, will not do; for this would be to leave that indefinite and uncertain which, by requiring occupation, becomes definite; and would also enable a party to claim an exemption based upon an intention to build, which may never become consummated, to say nothing of the frauds that might thus be perpetrated upon creditors, and even a forcible impairing of contracts made.

It is claimed, however, that while the defendant did not take actual possession of the premises until July 7, 1851, yet as he commenced improving the premises in the spring previous, and continued such improvements up to the time of moving into the house, that therefore he occupied them, within the meaning of the law, from the time of the commencement of such improvement. What we have already said, however, sufficiently indicates that we could not so hold. By "occupied," as here used, we think is meant something more than what is known in law as a constructive possession, as contradistinguished from actual possession. The owner of the fee is said to be possessed of it, though he may never have occupied it or made improvements thereon. This, in the absence of actual possession, is the possession which all have of their lands. We think it also means more than such possession as arises where land is cultivated, or being fenced and improved. And without seeking elsewhere, we think the meaning is fully and correctly expressed in the code, where it is defined as "the house used as a home." To be the homestead, it must be "used," and used for the purpose designed by the law, to wit, as a home, a place to abide in, a place for the family. When it is thus used and occupied, it becomes the homestead, and not before. To hold otherwise would be to enable parties to build houses professedly to be used as a homestead, and when levied upon to satisfy their debts before occupation, give them the privilege of exemption, when in fact they might afterwards convert them to other uses, and thus make the law an instrument of fraud instead of protection. It may be said, however, that in this case the intention formed in the spring of 1851 was actually carried out by moving into the house in July afterwards, and that before judgment. This is true, but at that time the law of 1849 was repealed. There was ownership, but not occupation under that law, and if the exemption is to be claimed by virtue of it, we think that both should concur. To illustrate: suppose that a judgment

had been obtained on the contract before the taking effect of the code, and execution had issued thereon, can there be any doubt but this property would have been liable? It appears to us clearly not. The language of the law is clear. It is that a homestead, consisting of a certain quantity of land, and the dwelling-house thereon, and its appurtenances, owned and occupied, shall not be subject to forced sale. How could an officer under such an execution, or a purchaser at such sale, know what the owner designed in the future to do with reference to its occupation? The law did not compel him to have such homestead, and it was not, therefore, so far a legal duty that they could judge in advance, or would be bound to know that he would appropriate it to that purpose.

If, then, it would not be exempt if so levied upon during the existence of the law of 1849, does it change the rule when it is levied upon afterwards, and after occupation? And here it is proper to remark that the property was previously liable to the execution, unless exempted by positive enactment. By this, we mean that, without some special statute making the exemption, all of the property of the debtor becomes subject to levy. And while these statutes should receive such construction as to carry out the liberal and benevolent policy of the legislature, yet it is apprehended that parties must bring themselves within their provisions, at least in spirit, before they can claim exemption under them. If the law of 1849 required occupation as well as ownership, in order to constitute the homestead and entitle the party to exemption, and if it is only by virtue of some such positive law that he could claim exemption, it would appear to follow, as a very clear consequence, that if he had not such homestead under the law, he cannot claim the benefit of the law. Until he was in a situation to be protected by the law, no right had accrued or become vested; and when the law was repealed, he stood just as he would though the law had never been enacted.

The law, then, having been repealed before the right became perfect, we next come to inquire whether the code can assist the defendant's claim, as is insisted in the argument. By the code, section 1249, it is provided that "it [the homestead] may also be sold on execution for debts contracted prior to the passage of this law, or prior to the purchase of such homestead," etc. Now, if the defendant had perfected his homestead under the law of 1849, the question would have been entirely different from the one here presented. In such case, it might be claimed

that the law of 1849 entered into and became a part of the contract, and that the homestead perfected under it could not be made subject by the subsequent law relating to antecedent contracts: See *Bridgman v. Wilcut*, 4 G. Greene, 563; but if not perfected, then no right had become vested or secured, and it might well be provided that the law should have a prospective, and not a retrospective, operation. And it will also be observed that the question does not arise whether the legislature would have the power to exempt the homestead from antecedent contracts; for the language is express that it is liable for such debts. We think, therefore, that the code cannot aid the defendant, unless another position assumed by him is true; and that is this: that the code having been passed or approved February 5, 1851, and this contract having been made in April afterwards, it was not a debt contracted prior to the passage of the law, but subsequent thereto; and therefore the property is exempt under the code. But this position is certainly untenable. The constitution provides that "no law of a public nature shall take effect until the same shall be published and circulated in the several counties of this state by authority." In accordance with this provision, and to carry it out, the general assembly that adopted the code made a general provision as to when laws should take effect after publication and circulation, and when the code should take effect. Accordingly, we know that the code took effect on the first day of July, 1851; and by section 35 of the code, "the terms 'heretofore' and 'hereafter,' as used in the code, have relation to the time when this statute takes effect." To say that section 1249 took effect from its passage would be to violate an express provision of the organic law, as well as the code itself. Had it never been published and circulated, it would have been no more the law of the land than if it had never been passed; neither was it the law, so as to effect the rights and property of parties, until it was so published. The words "prior to the passage," we think, amount to the same thing as if the legislature had used the word "heretofore," and either must relate to the time of taking effect, and not to the time of passage. To our minds, it would be a most dangerous doctrine to say that parties should be affected by a law, and that rights could grow up or become impaired by it, before it was published and circulated, to impart knowledge of its provisions. This was never intended, and the conclusion is not warranted by the letter, the spirit, nor the context.

These views dispose of this case, without examining the other

numerous points made. To say, according to the instructions of the court below, that if there was occupation of the premises after the repeal of the law, and before judgment and levy, they would be exempt, we cannot think would be correct; for by that rule the defendant might own the property under the law of 1849, and if he could, one day after its repeal, perfect his homestead by occupying it before judgment, so he could five years after the repeal; and if occupation is essential to constitute the right to claim it as exempt, then we cannot see how that right can be perfected, after the law has been repealed, which was imperfect at the time of the repeal. This right was inchoate and contingent, and before perfected, the law which extended the privilege or gave the right contingently was repealed; and whatever was not then perfected would not be assisted by the subsequent doing of those things which were necessary to confer the perfect right. While we do not say that there must have been ownership and occupation, or either, at the time the contract was made, yet we think there must have been both before the taking effect of the code.

Judgment reversed and cause remanded.

ACTUAL USE AND OCCUPATION ARE NECESSARY TO CONSTITUTE HOMESTEAD, IN IOWA: *Neal v. Coe*, 35 Iowa, 409, citing the principal case. The homestead character does not attach to property until it is actually occupied and used as a home: *Christy v. Dyer*, 14 Id. 440; *Hale v. Headlip*, 16 Id. 452; *Campbell v. Ayres*, 18 Id. 256, all citing the principal case. Under the Iowa code the homestead must be used for the purpose designed by the law, that is, as a home, a place to abide in, a place for the family: *Rhodes v. McCormick*, 4 Id. 373; *Kurtz v. Brunch*, 13 Id. 373, both citing the principal case. A mere intention to occupy the premises, although subsequently carried out, is not sufficient to make them a homestead: *Elston v. Robinson*, 23 Id. 211, citing the principal case.

EXEMPTION STATUTES SHOULD BE LIBERALLY CONSTRUED: *Davis v. Humphrey*, 22 Iowa, 140, citing the principal case; *Favers v. Glass*, 58 Am. Dec. 272; note to *Rockwell v. Hubbell's Adm'res*, 45 Id. 252, where this subject is discussed at length; *Carpenter v. Herrington*, 37 Id. 239, note 240, where other cases are collected.

STATUTE MUST BE CONSTRUED TO SPEAK from the first day of the session at which it was passed: *Weeks v. Weeks*, 47 Am. Dec. 358. In *Perkins v. Perkins*, 18 Id. 120, it was held that public acts of the general assembly take effect from its rising, if not otherwise provided. But in *Price v. Hopkin*, 13 Mich. 327, citing the principal case, it was held that a statute must be considered as beginning to speak when it takes effect, and not before.

THE PRINCIPAL CASE IS CITED in the following cases to the point that the word "hereafter," used in the code, has reference to the time when the code took effect, and not to the date of its passage: *Bennett v. Bevard*, 6 Iowa, 89; *Thatcher v. Haun*, 12 Id. 311; *Davenport v. D. & St. P. R. Co.*, 37 Id. 625.

BEAN v. BRIGGS.

[1 Iowa, 488.]

CERTIFICATE OF DEPOSIT IS NEGOTIABLE INSTRUMENT where it is made payable to the depositor or his order at a specified time after date, with interest.

PAYER OF CERTIFICATE OF DEPOSIT, WHO TRANSFERS IT BY BLANK INDORSEMENT, is liable on his indorsement.

BLANK INDORSEMENT CREATES SAME LIABILITY FROM INDORSER to indorsee as if it was full.

ACTION ON the following instrument: "Certificate. Illinois Phoenix Bank. Chicago, September 22, 1854. Briggs and Felthouser have deposited in this bank four hundred and sixty-two dollars and fifty cents, to the order of themselves, payable two months after date, payable to their order, on return of this certificate, at interest at six per cent. \$462.50. M. Roe & Co., cashier." The plaintiff in his petition alleged that this certificate was, before it became due, for value, transferred to him by the defendants by a blank indorsement; that at maturity it was presented for payment at said Phoenix Bank; that payment was refused, and the same was protested, and the defendants duly notified. The defendants demurred, on the grounds stated in the opinion, and the court sustained their demurrer and dismissed the suit.

Wiltse and Blatchly, for the appellants.

Benjamin M. Samuels, for the appellees.

By Court, WRIGHT, C. J. Two questions are presented for our consideration: 1. Is this instrument negotiable? 2. Are defendants liable on their blank indorsement? And both these questions must be answered in the affirmative.

We are aware that the authorities are conflicting as to the negotiable character of such instruments. In the case of *Patterson v. Poindexter*, 6 Watts & S. 227 [40 Am. Dec. 554], it was decided that an instrument very similar in its phraseology to the one under consideration was not negotiable. In *Kilgore v. Bulkley*, 14 Conn. 363, the instrument declared upon was in the following form:

"\$10,608.75.

CHESSEA BANK, July 6, 1839.

"I do hereby certify that David E. Wheeler, Robert S. Taylor, and Noah Bulkley, have deposited in this bank the sum of ten thousand six hundred and eight dollars and seventy-five cents, payable on the first day of December next, to their order, and on the return of this certificate.

"D. E. WHEELER, President."

And this was held to be a bill of exchange, imposing on the parties the ordinary liabilities attached to that kind of paper.

In *Bank of Orleans v. Merrill*, 2 Hill (N. Y.), 295, a certificate of deposit made by an association payable to the order of a particular person, at a specified time, with interest, was held to be in effect a negotiable promissory note. In determining between the conflicting authorities, in the language of the note to *Overton v. Tyler*, 1 Am. Lead. Cas. 312, note, the test perhaps consists in the inquiry, whether the transaction is a deposit, or an immediate debt, and engagement to pay. Applying this test, what is there in this instrument to make it a mere deposit in the nature of a bailment? We can see nothing. But on the other hand, it has all the requisites of a negotiable promissory note. It is conceded to have words of negotiability, in being made payable "to the order of themselves" and "to their order:" Story on Prom. Notes, sec. 3. Then, again, it is a written instrument, for the payment of a fixed amount in money absolutely, and subject to no contingency, at a certain time, and it is conclusively certain who is to pay and be paid. These requisites make a good promissory note, provided there is also what amounts in legal effect to a promise to pay: Story on Prom. Notes, secs. 11 et seq. For this purpose no particular form of words is necessary, nor need there be a promise in express language; but it is sufficient if an undertaking to pay is implied on the face of the note: *Overton v. Tyler*, 1 Am. Lead. Cas. 312, note. And so an order or promise to deliver a certain sum of money to A., or to be accountable or responsible to A. for a certain sum of money, or that A. shall receive it from the maker, is a good promissory note: Story on Prom. Notes, sec. 12.

The usual express words "I promise to pay," etc., it is true, are not contained in this instrument, but an undertaking to pay is clearly implied as contradistinguished from a mere acknowledgment of a deposit, in the nature of a bailment. That the sum is stipulated to draw interest almost necessarily excludes the conclusion that it was a bailment or simple deposit. Then, as to the promise, aside from the whole tenor of the instrument, we have the word "payable," used in two connections relating to the time of payment, as also to whose order the money was to be paid. It is not said that this money is returnable, which might imply an acknowledgment of a deposit or indebtedness, but that a certain sum is payable. So also the use of the negotiable words "to their order," or "order," may well have effect in determining the character of the undertaking or engagement,

and assist us in concluding that this was a promissory note in legal effect. And again: compare this instrument with the following, which have been held to be promissory notes: "Due K. & K. three hundred and twenty-five dollars, payable on demand, October 20, 1821:" *Kimball v. Huntington*, 10 Wend. 675 [25 Am. Dec. 590]; "Due J. J. F. two hundred dollars, borrowed October 21, 1836:" *Cummings v. Freeman*, 2 Humph. 143; "Good to R. C. or order for thirty dollars borrowed money:" *Franklin v. March*, 6 N. H. 864 [25 Am. Dec. 462]; and see *Fleming v. Burge*, 6 Ala. 373; *Harrow v. Dugan*, 6 Dana, 341.

We conclude, therefore, that the rule recognized in the case of *Kilgore v. Bulkley*, 14 Conn. 862, and like authorities, is the safer and better one, and that thereunder defendants are liable on this instrument in this action, to say nothing of their liability as immediate indorsers, if it was not negotiable.

On the second point, in view of the above, we need hardly say that the blank indorsement creates the same liability from the indorser to the indorsee as if it was full; giving the holder full power to demand payment, or to make it payable at his pleasure, to himself, or to any other person on his order. This is well settled upon principle and authority: Story on Prom. Notes, sec. 138.

Judgment reversed.

CERTIFICATE OF DEPOSIT IS NEGOTIABLE SECURITY: See *Welton v. Adams*, 60 Am. Dec. 579, note 581, where other cases are collected.

BLANK INDORSEMENT VESTS TITLE IN HOLDER: See *Sterling v. Bender*, 44 Am. Dec. 539, note 540, where other cases are collected. A blank indorsement creates the same liability as if it was full: *Harrison v. McKim*, 18 Iowa, 487, citing the principal case.

BALTZELL v. NOSLER.

[1 Iowa, 586.]

IN ACTION ON JUDGMENT OF SISTER STATE, DEFENDANT MAY DENY AUTHORITY OF ATTORNEY who appeared for him in the original action.

TRANSCRIPT SHOULD BE MADE BY TAKING RECORD OF PROCEEDINGS of the court as a basis, and incorporating therein each paper filed, in its proper place and date. It should not consist of merely naked copies of papers, but should contain sufficient explanation by the clerk to show their order, dates, and connection.

IN PLEADING UNDER CODE, AVERMENT OF FACTS CONSTITUTING CAUSE OF ACTION or defense should be simple and concise, and without repetition or prolixity.

WHERE VARIOUS CAUSES OF ACTION ARE UNITED IN ONE PETITION, they should be separately and distinctly stated.

APPEAL from the Marion district court. The opinion states the case.

Eastman and Rice, for the appellant.

Knapp and Caldwell, for the appellees.

By Court, WOODWARD, J. This action was brought on a judgment recovered in Indiana, which was rendered on confession by one Edward W. McGaughey, by virtue of a warrant of attorney. The record is in great confusion, and it is difficult to ascertain the true state of the case. One thing, however, appears, which is the only one which we will attempt to decide. The defendant denies the authority of McGaughey to appear and confess. Among the papers there is no denial of this matter, but there is a demurrer to it, and the demurrer is sustained. The connection between this answer and this demurrer is shown by the matter of them.

These pleadings raise the question, whether the defendant may deny the authority of the attorney who appeared for him in the action in Indiana. We believe he may. The subject of pleading to judgments recovered in sister states, of what statements in the record may be denied, and similar questions, have undergone much discussion in the following cases: *Green v. Sarmiento*, 1 Pet. C. C. 74; *Mills v. Duryee*, 7 Cranch, 481; *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88]; *Field v. Gibbs*, 1 Pet. C. C. 155; *Hampton v. McConnel*, 8 Wheat. 234; *Benton v. Burgot*, 10 Serg. & R. 240; *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Andrews v. Montgomery*, 19 Id. 162 [10 Am. Dec. 213]; *Hall v. Williams*, 6 Pick. 232 [17 Am. Dec. 356]; *Harrod v. Barretto*, 1 Hall, 155; *Newell v. Newton*, 10 Pick. 472; *Starbuck v. Murray*, 5 Wend. 148 [21 Am. Dec. 172]; *Shumway v. Stillman*, 6 Id. 447; S. C., 4 Cow. 292 [15 Am. Dec. 874]; *Aldrich v. Kinney*, 4 Conn. 380 [10 Am. Dec. 151]; *Welch v. Sykes*, 3 Gilm. 198 [44 Am. Dec. 689]; *Ewer v. Coffin*, 1 Cush. 24 [48 Am. Dec. 587]; *Dimick v. Brooks*, 21 Vt. 569, 580; *Jacquette v. Hugunon*, 2 Mo-Lean, 129; *Lincoln v. Tower*, Id. 478; *Westervelt v. Lewis*, Id. 511; see also, as cases referred to, *Kimmel v. Shullis*, Breese, 169; *Spencer v. Brockway*, 1 Ohio, 259 [13 Am. Dec. 615]; *Hoxie v. Wright*, 2 Vt. 268-268; 1 Kent's Com. 260; *Thurber v. Blackbourne*, 1 N. H. 242; *Clarke's Adm'r v. Day*, 2 Leigh, 172; *Pritchett v. Clark*, 3 Harr. (Del.) 241, and 4 Id. 280, same case reversed.

The question in the case at bar, whether the defendant can deny the authority of the attorney in the former cause to appear

for him, is decided in the affirmative in the above cases. *Shumway v. Stillman*, *Welch v. Sykes*, *Aldrich v. Kinney*, and *Hall v. Williams*, *supra*, are cited on the same side. The proposition of law on which these cases proceed is, that the jurisdiction of the court over the person may be denied. And when the pleading arrives at such a point as that in this case, it becomes an issue of fact.

This allegation, therefore, in the answer is well pleaded, and the court erred in sustaining the demurrer.

The allegations as to the defendant's liability, under the former judgment, are put in various forms, and it may not be improper to make a suggestion. It is not sufficient to allege that the defendant was not a resident of that state; nor that he was not within that state; nor that he had no notice of the suit; nor that he was not served with process; he must follow any or all of these averments by one that he did not appear; and if the record states that he appeared by attorney, he must deny the authority of the attorney, if the truth warrants him in it; and this is conceived to be the extremity of denial of the record. Whether he may deny that he appeared, or that an attorney appeared, when the record says he did, is discussed in some of the later of the above-cited cases: See *Hall v. Williams*, *Starbuck v. Murray*, *Shumway v. Stillman*, *Welch v. Sykes*, *supra*.

On account of the omission of papers, or of the want of proper reference to them, or identification of them, we cannot venture to decide other questions in the case, and we have deemed it better to determine the one above, and put the cause in progress than to hold it hung up in court.

We feel justified in availing ourselves of the occasion presented by this case in making a suggestion in relation to pleadings, and the manner of preparing papers for this court. Many attorneys among us are young in the profession, and of the clerks of the courts, many have had no experience and very few are lawyers. In consequence, causes come to this court which are difficult to adjudicate on account of the state of the papers; and sometimes, if the court undertakes it, it is done at a hazard of doing injustice; yet the court is unwilling to send the parties away because the clerk has prepared his transcript badly. The case at bar, for instance, cannot be adjudicated upon several questions which were probably raised. There is both omission and commission, and also want of identification of papers. The original answer, and one or more bills of exception which are referred to in other papers, are

omitted. Several papers do not show to what dates and stages of the case they belong. The transcript should be made similar to a complete record, by taking the record of the proceedings of the court as a basis and incorporating in that record each paper filed in its proper place and date. The transcript should not consist of merely naked copies of papers, but should contain sufficient explanation by the clerk to show their order, dates, and connection. In the present case, the copy of the record of proceedings is on one paper by itself, and every other paper of the case is copied separately, on distinct pieces of paper, and these copies are then attached together miscellaneous without any regard to the order in which they arose. Papers which belonged to a bill of exceptions, and were attached to it, and referred to in it by the letters A, B, C, etc., are copied and put separately in the mass. In the case of some papers, we are left to find the date of its coming into the case by the indorsement of filing on the back of the copy, and sometimes there is nothing to show where it belongs in the case.

In regard to pleadings, one or two general remarks will not be considered improper. The practice in some parts of the state conveys to the mind the idea that we are prohibited by the code from any degree of assimilation to the common-law forms, and that we must depart from those as far as possible. The code abolishes forms of actions, and it requires but very few new averments. But why should not a cause of action or a defense be laid, in its substance, very much after its former manner? Can we make them more brief, accurate, and comprehensive? The averment of the facts constituting the cause of action or defense is still, and more than ever if possible, the body and substance of the pleading. The code contemplates, it is apprehended, that we should look to these essential facts, and allege them simply. The greatest departure, and the one producing the greatest confusion and doubt, is the practice of alleging in the answers in actions at law a great variety of circumstances and collateral facts which go to confuse the pleading, and are far from aiding in the formation of the issue. These resemble answers in chancery, but are much out of place, as they render it more difficult to ascertain the real issue. In an action at law, the result is always single, yes or no, promise or no promise, guilty or not guilty. But in equity it is not so. The result or decree may be partly one way and partly another; in part for the complainant and in part for the respondent; it is modified by various circumstances, and therefore these

circumstances are properly set forth in the pleading. The very nature of the cases points to the essentially distinctive features of the two jurisdictions, and at the same time dictates the difference in the pleadings.

In the case at bar, the pleadings are not so subject to these remarks as in many other causes, yet there is repetition and prolixity in them. The averment that the defendant had no notice of the former action is made three times. The statute of limitations of 1851 is pleaded three times, and the authority of the attorney to appear in the former action is twice denied. As when the code says that various causes of action may be united in one petition, it does not recommend such practice, so when it abolishes forms of actions and pleadings, and provides that certain kinds of defects shall not be fatal, it does not recommend a total departure from all that we have been used to, and an indulgent rioting in disorder and confusion. For instance, though we may unite several causes of action in one petition, why should we now, any more than under the former practice, huddle them all into one count? Not only the common-law manner, but clearness, distinctness, convenience, good logic, and professional propriety and order, dictate that we should lay them in separate counts, and make the defenses separately and distinctly; and that a set-off should not be mingled with matter of defense proper. The pleadings under the code are capable of being made simple and neat, and generally about as brief and comprehensive as at common law. Such a result is very desirable, but the power of accomplishing it lies principally with the district court. The code provides general rules and directions, but has left the details to be reduced to order and symmetry by the courts; and sections 1589, 1590, 1591, 1785, and 1753 confer ample authority for this purpose.

The judgment of the district court is reversed and a writ of *procedendo* will issue directing the said court to proceed in conformity with this opinion.

WRIGHT, C. J., not sitting.

APPEARANCE OF ATTORNEY.—The mere appearance of an attorney is presumptive evidence of his authority: *Piggott v. Addicks*, 56 Am. Dec. 547, note 549. But this presumption may be rebutted by evidence that he was not authorized to appear: *Roselius v. Delachaise*, 52 Id. 597, note 599, where other cases are collected. And a judgment debtor in an action on a judgment of a sister state may successfully defend by showing that the attorney who appeared for him in the original suit had no authority to do so: *Harshey v. Blackmarr*, 20 Iowa, 172, citing the principal case.

PLEADING UNDER CODE.—Many causes of action may be joined, but each should be set out separately from the others: *Mooney v. Kenney*, 61 Am. Dec. 576, note 590, where other cases are collected. While all technical forms of action and pleadings have been abolished by the code, it by no means follows that all the rules and principles which formerly governed good pleadings and trials in common-law actions have been done away: *Ranson v. Guiberson*, 6 Iowa, 509, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Struble v. Malone*, 3 Iowa, 587, to the point that in an action on a judgment of a sister state, an answer which denies only that the defendant was not at the time of the service a resident of the state, and that he was not served, and that he had no notice of the pendency of the suit, and that he had no agent or attorney authorized to appear for him, is not sufficient. But he must aver that he did not appear, or did not voluntarily submit his cause to the court.

RATLIFF v. ELLIS.

[2 IOWA, 59.]

PAROL EVIDENCE CANNOT CHANGE ABSOLUTE DEED INTO ONE OF TRUST unless there be fraud, accident, or mistake.

EXPRESS TRUST IN LAND CAN BE CREATED OR DECLARED BY WRITING ONLY.

EXPRESS TRUST UPON LAND CONVEYED BY DECEDENT CANNOT BE CREATED BY INVENTORY OF ESTATE that includes land as part of the estate, but states the title to be in another, notwithstanding the grantee was present when the inventory was made, and knew of it, but made no objection. It is no writing of the grantee, and amounts to no more than parol evidence.

EXPRESS TRUST UPON LAND CONVEYED BY DECEDENT TO ONE WHO BECOMES ADMINISTRATOR cannot be created by charge for payment of taxes in administration account, when it is not shown that the taxes were levied on this land, although it appears that the amount of the charge is the same as the tax would have been upon this land. The evidence is too uncertain to constitute a written acknowledgment of the administrator that the land was part of the decedent's estate.

BILL by the heirs of John Ratliff against Mehitable Ellis, sole devisee of P. Ellis, to recover certain lands and the rents thereof, on the ground of an alleged trust in the land resting upon P. Ellis, deceased, in favor of Ratliff, deceased. Ratliff purchased the land of the county of Jefferson, and paid the purchase money. He then conveyed the property to Ellis for the expressed consideration of five hundred dollars. On the same day Ellis conveyed to Ratliff for the same consideration certain lands in Jefferson county. It was alleged that Ratliff and Ellis were on terms of intimate friendship, and that Ratliff, because he was addicted to the excessive use of intoxicating liquors, and feared that he would squander this property and leave his family des-

titute, put the title in Ellis with the intention, and upon the latter's express promise, that he would hold it in trust for Ratliff and his family. This express promise was not proved; but there was much parol evidence showing that Ellis often spoke of the property as belonging to Mrs. Ratliff, that he spoke of owing her rent for the premises, and when he sold part of the land, the purchase price of which was also prayed for, he did so in consultation with her and with her consent; and that the note taken for part of the purchase money, although made to him as payee, was placed in her possession, and the amount thereof paid to her without objection. To take the case out of the statute of frauds, and to furnish a written acknowledgment of the trust, complainants relied upon two circumstances; namely, that when, after Ratliff's death, his estate was inventoried, this land was included as part of his estate, but with a note appended stating that the title was in Ellis. Ellis was present when the inventory was taken, and knew of it, but made no objection. Secondly, that upon the former administrator resigning the administration, Ellis was appointed in his stead. In his administration account, to which his signature is appended, Ellis made a charge against the estate for eight dollars and forty-one cents paid for taxes for the years 1846 and 1847. Complainants alleged that there was no property upon which such tax could accrue unless upon this land; and that at the rate of tax levied for those years upon the valuation of this land, adding the poll-tax which was extended to women owning property, the tax would amount to eight dollars and forty-one cents. The decree was for the complainants as prayed for, and the respondent appealed.

Clinton and Knapp, for the complainants.

Slagle and Wilson, for the respondent.

By Court, WOODWARD, J. This cause is presented to us in an overwhelming mass of papers, commendatory of the patience, industry, and faithfulness of the counsel, but of doubtful utility toward the result. If it were possible to make a resulting trust of the case, it would be easy of decision, for there is much testimony tending to support such a case, and to charge Ellis, were it not that Ratliff, by his own assignment and deed, conveyed this property to Ellis. Were it not for this, the payment of the purchase money by Ratliff, with the testimony, would probably make out a trust, so far as the title derived from the county is concerned. But this whole mass of testimony does not help us to dispose of

the deed from Ratliff. Here the statute of frauds, and the common-law rule of evidence in relation to changing or adding to written instruments by parol evidence, meets us. Parol evidence is not permitted to change an absolute deed into one of trust, unless there be fraud, accident, or mistake alleged, and to be proved. We may personally be convinced by the testimony that the grantee was to hold in trust, but the peremptory rule of the law will not permit us to declare it so. That law has said that such a trust can be created or declared by writing only. And it is our duty to administer the law as it is, and not to indulge our feelings, nor follow our personal convictions alone. The counsel very rightly disclaim the idea of a resulting trust, and explicitly rely upon an express one. Where, then, is it expressed? It is not in the deed from Ratliff to Ellis. We are referred to the inventory, and to the charge for paying taxes in the administration account. The first is no writing of Ellis. It has not even his signature. It amounts to no more than the parol evidence. And as to the other items, shall the court take property from one person and give it to another, upon the strength of that charge in the account? How uncertain, how loose, how indefinite, is this evidence! It was not named in the papers on what property, even, the tax was levied. If it had been on these lots, the assessment roll would show it; and parties who have been so industrious in accumulating papers would not have omitted this evidence. Many ways may be conceived in which this tax may have been made up. It may have been levied on the outstanding debts due the estate, an amount of which is shown, which would have admitted this and even more tax. But tax-lists are not of so accurate a character as to found a safe argument upon them. This item of evidence is too uncertain to act upon in a matter of importance, and requiring a fair degree of assurance. And this is the only item of evidence in writing, "signed by the party," which is contained in all the papers pertaining to this cause.

We cannot decree this property to be conveyed to the complainant without overturning one of the great rules of the law, which constitutes the security of all property.

If it operates unkindly in an occasional instance, we must remember that imprudence only will cause it so to work, and that the rule is a bulwark of safety to all. It is not uncommon for a court to be compelled to act in accordance with this rule against the fullest and clearest parol evidence: See the cases of *Harkins v. Edwards*, 1 Iowa, 426; *Clark v. Russel*, 3 Dall. 415; *Faw v.*

Marssteller, 2 Cranch, 10; *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150]; *Mayhew v. Prince*, Id. 54; *Cook v. Eaton*, 16 Barb. 439; *Webb v. Rice*, 6 Hill, 219; *Arfridson v. Ladd*, 12 Mass. 173.

However reluctant we may be, therefore, the court is under the necessity of reversing the decree of the district court, and dismissing the complainant's bill.

WRIGHT, C. J., not sitting.

PAROL EVIDENCE IS NOT ADMISSIBLE TO VARY LEGAL EFFECT OF DEED: See *Melton v. Watkins*, 60 Am. Dec. 481; *Woolen v. Hillen*, 52 Id. 690, and cases cited in the notes.

PAROL EVIDENCE MAY ESTABLISH RESULTING TRUST: *Williams v. Hollingsworth*, 47 Am. Dec. 527; *Neill v. Keese*, 51 Id. 746; *Strimpfier v. Roberts*, 57 Id. 606; *Hollida v. Shoop*, 59 Id. 88, and cases cited in the notes. See note to *Baker v. Vining*, 50 Id. 624; *Neill v. Keese*, 51 Id. 759, 760. The principal case is cited to the point that parol evidence, to establish resulting trust, must be clear and unequivocal, in *Childs v. Griswold*, 19 Iowa, 364.

WRITING NECESSARY TO CREATE EXPRESS TRUST IN LAND: See *Leakey v. Gardner*, 38 Am. Dec. 784; *McElderry v. Shipley*, 56 Id. 703; *Thomson v. Branch*, 33 Id. 153. In Texas it may be created by parol: *James v. Fulcrod*, 55 Id. 743. See also *Miller v. Thatcher*, 60 Id. 172; *Cowen v. Wheeler*, 43 Id. 283; *Padgett v. Lawrence*, 40 Id. 232. The principal case is cited to the point of the necessity of written evidence, in *Pratt v. Green*, 25 Iowa, 42.

CANNON v. FOLSOM.

[2 Iowa, 101.]

MEASURE OF DAMAGES FOR FAILURE TO DELIVER GOODS AT SPECIFIED TIME AND PLACE, when the price is not paid or advanced before time for delivery, is the difference between the contract price and the market price at the time for delivery.

MEASURE OF DAMAGES FOR FAILURE TO DELIVER GOODS AT SPECIFIED TIME AND PLACE, where price has been paid prior to time for delivery, is the highest market price between day for delivery and time when suit is brought, provided the plaintiff does not unreasonably delay the institution of his suit.

WRITTEN CONTRACT CANNOT BE ENLARGED BY PAROL EVIDENCE.

IN ACTION FOR BREACH OF WRITTEN CONTRACT TO DELIVER SAW-LOGS, plaintiff cannot recover prospective profits to accrue from sawing the logs into lumber, nor damages for his mill lying idle and the wages of laborers to take care of it.

ACTION for breach of contract by Cannon against Folsom. The contract was written, and contained stipulations to the effect that Folsom should deliver to Cannon in the river opposite his mill, or at Le Claire, on or before a day mentioned, eight hundred and forty-three thousand three hundred and twenty-three feet of

pine logs, then in the Mississippi river on their way down. Cannon agreed to pay at the rate of fifteen dollars per thousand feet, as follows: five thousand dollars in hand, the receipt whereof was acknowledged, and the balance upon the delivery of the logs. The plaintiff alleged that only three hundred and fifty-nine thousand nine hundred and three feet of logs were delivered; also that he was the owner of a saw-mill at Davenport, and that the defendant knew it; that he bought the logs in order to saw them into lumber at his mill; that after the breach of the contract the price of pine logs rose to eighteen dollars per thousand; that he was unable to obtain other logs during the remainder of the year, and before the closing of the river, so that his mill remained idle for six months. He claimed as damages the money advanced above the price of the logs delivered, and for the enhanced price of the logs not delivered, three dollars per thousand; and the "following special damages:" the sum of three thousand five hundred dollars, the price and value of the lumber into which the logs were intended to be sawed, over and above their cost and the cost of sawing them; the sum of five thousand dollars because of the plaintiff's mill lying idle for want of the logs, and the wages paid to laborers for taking care of and preserving the saws while idle. To that part of the plaintiff's petition claiming "special damages," the defendant demurred. The demurrer was sustained, and the plaintiff appealed.

Whitaker and Grant, for the appellant.

Cook and Dillon, for the appellee.

By Court, Issell, J. There is some difficulty in clearly understanding what was intended by the defendant in his demurrer by "special damage," as well as in the ruling of the court, where the same phrase is used. This may mean the damages specially counted upon by plaintiff; or it may mean those damages claimed after the words "the following special damages," used in the declaration. From the whole case, we conclude that the latter was intended by the demurrer and ruling. Assuming this to be the matter demurred to, the following are the damages claimed, which were excluded by the sustaining of the demurrer, viz., the sum claimed as the price of the lumber into which the logs were intended to be sawed, over and above the cost thereof and the cost of sawing the same; for the mill lying idle, and for the wages of laborers to take care of and preserve the saws while the mill was idle.

The general settled rule of damages, both in England and the United States, for failing to deliver goods at a specified time and place, when the price is not paid or advanced before the time for delivery, is the difference between the contract and market price at the time the delivery should have been made. The authorities cited by defendant are full on this point, and further reference here is deemed unnecessary.

Where the price of the commodity contracted to be delivered has been paid prior to the time for delivery, a somewhat different rule obtains, and it has been repeatedly held that in such case the plaintiff is not confined in his recovery to the difference between the contract and market price on the day of delivery: *Clark v. Pinney*, 7 Cow. 681; *West v. Pritchard*, 19 Conn. 212; *per Marshall*, C. J., in *Shepherd v. Hampton*, 8 Wheat. 200; but he may recover the higher market price between the day for delivery and the time suit is brought, provided the plaintiff does not unreasonably delay the institution of his suit. These are well-established rules of law. A party contracting to deliver goods at a specified time and place, where no express stipulations enter into the contract to vary his liability, may be fairly presumed to have contracted with relation to them. There is nothing in the contract at the foundation of this suit that tends to show that any other than the ordinary liability was stipulated for. The contract is in writing, and the plaintiff, in his recovery, must be confined to it. It is not competent to enlarge it by parol evidence, or by special pleading. To allow any of the damages excluded by the demurrer would be to enlarge the contract.

It is laid down by Williams, C. J., in delivering the opinion of the court in *Bush v. Chapman*, 2 G. Greene, 551, that "if the plaintiff sue on a written or special contract so as to make it the basis of his action, it must regulate his right to recover, as well as the amount."

We hold, therefore, that the demurrer was properly sustained.
Judgment affirmed.

LOSS OF PROFITS AS ELEMENT OF DAMAGES: See *Bagley v. Smith*, 61 Am. Dec. 756, and note citing prior cases 761; see also *Goodloe v. Rogers*, Id. 205.

MEASURE OF DAMAGES FOR FAILURE TO DELIVER GOODS AT TIME AND PLACE SPECIFIED: See *McCombs v. McKennan*, 37 Am. Dec. 505; *Furlong v. Polley*, 50 Id. 635; *Davis v. Fish*, 48 Id. 387; *McKnight v. Dunlop*, 55 Id. 370; *Coffman v. Hampton*, 37 Id. 511; *Bailey v. Shaw*, 55 Id. 241; see also *Masterton v. Mayor of Brooklyn*, 42 Id. 38. The principal case is cited to the point that the measure of damages for non-delivery of personal property contracted for, where the price is not paid in advance, is the difference between the contract price and the market value at the time and place stipulated, in the absence

of express stipulations to the contrary: *Jemison v. Gray*, 29 Iowa, 542; *Harrison v. Charlton*, 37 Id. 136; *Mansville v. Western Union Tel. Co.*, Id. 219; *Cobb v. I. C. R. Co.*, 38 Id. 631; *Gadling v. Newell*, 12 Ind. 125; to the point that when the price has been paid in advance, the plaintiff may recover the highest market price between the day fixed for delivery and the time suit is brought, provided there is no unreasonable delay in bringing the suit: *Mansville v. Western Union Tel. Co.*, 37 Iowa, 219; *Page v. Fowler*, 39 Cal. 424; "up to the time of the trial:" *Clement v. Duffy*, 54 Id. 635. In *Safely v. Gilmore*, 21 Iowa, 590, the counsel for the plaintiff contended that the principal case established the principle that where the price is paid in advance, the plaintiff may recover the highest price between the day fixed for delivery and the commencement of the suit. The court, however, held that whether that principle could be considered as established or not, it could not be extended to the case of landlord and tenant; and in an action by a landlord against a tenant, to recover the value of rent payable in property, the measure of damages was the value of the property at the time it was demanded.

PAROL EVIDENCE NOT ADMISSIBLE TO VARY TERMS OF WRITTEN CONTRACT: *Ruis v. Norton*, 60 Am. Dec. 618; *Porter v. Pierce*, 55 Id. 151; *Burke v. Cruger*, 58 Id. 102; and cases cited in the note.

YOUNG v. DANIELS.

[² Iowa, 126.]

APPLICATION FOR SPECIFIC PERFORMANCE OF CONTRACT IS ADDRESSED TO SOUND DISCRETION OF CHANCELLOR, guided and governed by the general principles of equity.

RELIEF IS NOT MATTER OF RIGHT IN EITHER PARTY TO SUIT FOR SPECIFIC PERFORMANCE, but it is granted or withheld, according to the circumstances of each case, when the rules or principles of equity will not furnish any exact measure of justice between the parties.

SPECIFIC PERFORMANCE IS GRANTED TO GREATER EXTENT IN CASES OF CONTRACTS RESPECTING REAL PROPERTY than in cases respecting personal property; and while in the latter case the jurisdiction to grant it is limited to special circumstances, in cases of land contracts it is universally maintained.

TIME MAY BE OF ESSENCE OF CONTRACT CONCERNING LAND.

TIME IS NOT, IN EQUITY, OF ESSENCE OF CONTRACT, except by express stipulation of the parties, or unless it necessarily follows from the nature and circumstances of the contract.

TIME IS NOT MADE ESSENCE OF CONTRACT FOR SALE OF LAND by a clause giving the vendor the election to consider the contract at an end in the event of the non-payment of the money at the time limited, without some evidence that the vendor elected so to treat it.

TIME IS NOT ESSENCE OF CONTRACT FOR SALE OF LAND, in the absence of express agreement, and the contract is not forfeited by non-payment of money on day it becomes due; but specific performance may be enforced where it does not appear either that the land was improved, yielding a yearly rent, or that the property is liable to fluctuation in value, or has actually changed in value, or that between the sale and offer to pay

there was any change affecting the rights, interests, or obligations of the parties, or that the vendee, by his acquiescence or otherwise, has treated the contract as rescinded.

ACQUIESCEENCE OF VENDEE IN RESCISSION OF CONTRACT FOR SALE OF LAND cannot be inferred where he proposes to pay the consideration with the highest rate of interest, and brings suit for specific performance before the vendor indicates any intention of declaring the contract at an end.

VENDEE DOES NOT FORFEIT RIGHT TO SPECIFIC PERFORMANCE BY LACHES in offer to pay purchase money, when it appears that vendor was a non-resident of the state; that neither he nor any person for him was at the place of payment to demand payment when the notes for the purchase price became due; that he gave the vendee no notice that he should insist upon strict compliance with the contract, and had not returned the notes to the vendee; that within three months after the last note became due the vendee, at the place where the notes were to be paid, and to the person who had been the vendor's agent in the premises, offered to perform the contract on his part and demanded the deed; and that within six months thereafter the vendee commenced suit to enforce specific performance, bringing the money into court.

VENDEE SEEKING TO ENFORCE SPECIFIC PERFORMANCE NEED NOT TENDER DEED to vendor for execution before bringing suit.

VENDEE, BEFORE BRINGING SUIT FOR SPECIFIC PERFORMANCE, must have performed or offered to perform whatever the contract has made a condition precedent on his part.

VENDEE IS NOT BOUND TO FOLLOW VENDOR TO HIS RESIDENCE WITHOUT STATE to make tender before bringing suit for specific performance, after he has applied within reasonable time after the maturity of the notes at the place stipulated for their payment, and there demanded the deed.

PETITION for specific performance of contract for sale of realty. Demurrer was overruled, and the respondent failing to answer, decree was entered pursuant to the prayer of the petition. Respondent appeals, relying upon the demurrer. The petition alleges that at the time of making the contract the respondent was a non-resident of the state, and so continued until the institution of this suit, being a resident of New York. The contract was executed by McGregor, as attorney of respondent. Complainant was to pay two hundred dollars for the land for which he gave his notes for one hundred dollars each, due in one and two years, with interest at ten per cent per annum from date. The notes were payable to respondent at the office of his attorney, McGregor. A condition of the bond was that in the event of the non-payment of the purchase price or any part thereof at the time agreed upon, the respondent Daniels might elect to consider the contract at an end, and Young should be considered the tenant of Daniels, holding over after the termination of his lease. The petition admitted the non-payment of the notes at maturity, but averred that neither the respondent nor any person

for him was at the place agreed upon to demand payment. It was also averred that the respondent had neither returned to the complainant his notes nor given him notice of his election to consider the contract at an end. About three months after the maturity of the second note at McGregor's office, the complainant offered to perform his part of the contract, to pay the money due, and demanded a deed. The respondent was not present, and the attorney refused to perform the contract, his authority having been revoked, and no other person was there to perform the contract. The complainant offered to pay, and alleged that he brought into court the money due on the notes, and prayed that the respondent be decreed to perform specifically the contract on his part.

G. C. R. Mitchell, for the appellant.

Whitaker and Grant, for the appellee.

By Court, WRIGHT, C. J. To reverse this decree, respondent insists under his demurrer: 1. That time was of the essence of the contract between these parties, and that the bill shows such default on the part of complainant in making payment as releases the respondent from any obligation therein; 2. That the bill does not aver the tender of a deed to respondent for execution before suit brought; 3. That no such tender of the amount due on the bond is stated as entitles complainant to a decree.

An application to enforce the specific performance of a contract is always addressed to the sound discretion of the chancellor, guided and governed by the general rules and principles of equity jurisprudence: *Shaw v. Livermore*, 2 G. Greene, 343; Story's Eq. Jur., sec. 742. In such cases relief is not a matter of right in either party, but it is granted or withheld according to the circumstances of each case, when such rules or principles will not furnish any exact measure of justice between the parties. Neither can any rules or principles be laid down which will be of absolute obligation or authority in all cases. In contracts respecting real property, however, courts of equity are in the habit of interposing to grant relief to a far greater extent than in cases respecting personal property; and while in cases respecting chattels this jurisdiction is limited to special circumstances, in cases of land contracts it is universally maintained: *Id.*, sec. 746.

In reference to such contracts, also, there can now be no doubt but that time may be of their essence. Says Story, J., in

Taylor v. Longworth, 14 Pet. 172: "Time may be made of the essence of the contract by the express stipulations of the parties, or it may arise by implication, from the very nature of the property or the avowed objects of the seller or purchaser." And even when time is not thus expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of circumstances, affecting the rights, interests, or obligations of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust. But, except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of the contract; and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But it is also true that in all such cases the complainant should make out a case free from doubt; show that the relief asked is equitable under the circumstances, and account in a reasonable manner for his delay, and any apparent omission of duty. Time is, however, not deemed in equity of the essence of the contract, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract: Story's Eq. Jur., sec. 776; *Brashier v. Gratz*, 6 Wheat. 528; *Mathews v. Gillies*, 1 Iowa, 242; *Brumfield v. Palmer*, 7 Blackf. 227.

Let us now apply the foregoing general doctrines to the facts of this case, as to the first ground of demurrer. And we have no hesitation in saying that time has not been made of the essence of this contract by the express stipulation of the parties. The conditions of this bond are not unlike ordinary contracts, except the clause giving the vendor the election to consider the contract at an end in the event of the non-payment of the money at the time limited. And we conclude that this provision cannot of itself be construed as making time material, without some evidence that the vendor elected to so treat it. By this clause the vendee agreed that the vendor should have the power to declare the contract at an end upon his failure to pay the money, and the vendor reserved to himself the right to so elect. And therefore, if he had so elected, and declared the contract forfeited, and returned to the vendee his notes, he might well claim that complainant was not entitled to relief. The bill, however,

expressly charges that respondent never has returned or offered to return these notes, and that he has never elected to declare the contract forfeited or at an end, and on demurrer, these averments are, of course, taken as true. In *Benedict v. Lynch*, 1 Johns. Ch. 370, the stipulation was that "if the plaintiff failed in either of his payments, the agreement was to be void," and this stipulation the chancellor upheld, and dismissed the bill. This is the leading case upon the subject of specific performance in this country; and while it certainly has not been followed uniformly by other tribunals, yet, giving to it all the weight due to the eminent jurist who delivered the opinion, we do not think it applicable to this case, in that the agreement was to be void if the vendee failed in his payments; and by this language it is said the parties expressly made time of the essence of the contract. In this case, however, the contract, upon the non-payment of the purchase money, was to be at an end if the vendor so elected. In the one case, as we view it, the contract declared the consequence of non-payment; in the other, the vendor reserved the right to declare the consequences. This he never did; and it would be manifestly inequitable and unjust to permit him to retain the vendee's notes (as he does even yet); never to do anything to notify him that he declared the contract at an end; and yet hold that there was a forfeiture of the contract because the money was not paid on the day it became due. *Scott v. Fields*, 7 Ohio, 424, was a case similar to the one above cited from 1 Johns. Ch. In that case the stipulation was that if the plaintiff failed to make the payments as specified, he was to forfeit a payment made, and to have the agreement considered null and void. And it was held that by this stipulation the parties had made time of the essence of the contract; that this had been violated by the complainant, and his bill was therefore dismissed. The distinction between this stipulation and the one in the case at bar is more palpable even than in that of *Benedict v. Lynch*, 1 Johns. Ch. 370.

The case of *Gibbs v. Champion*, 8 Ohio, 385, was different from the preceding one. There one half of the purchase money was to be paid in January, and the other half in the succeeding July. Nothing was paid until the latter day, and then the whole amount due was tendered. A specific performance was decreed, and a prominent reason assigned for the decision is that after the default, in not paying the first installment, the vendor held on to the contract, and neither offered to return the notes nor took any other steps to exonerate the vendee from his liability.

In *Bummington v. Kelley*, 7 Id. 432, however, the vendors, after default, offered to return the notes, and when refused, deposited them in the hands of a third person for the use of the maker; and the vendors not acquiescing in the delay, but having informed the vendee that they considered the contract at an end, and been active in freeing themselves from liability, it was held that they were discharged. So in the case of *Ewing's Lessee v. Higby*, Id. 198 [28 Am. Dec. 633], it is held that the law requires some positive act by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives a reasonable time to comply; but it requires eagerness, promptitude, ability, and a disposition to perform by him who would resist a rescission of his contract. This notice on the part of the vendor to free himself from liability would of course not be necessary in cases where time was either expressly or impliedly of the essence of the contract, or where the vendee had by his own laches forfeited all claim to relief.

Neither do we perceive anything in the nature of this property, or otherwise, to justify us in concluding that time was designed to be made of the essence of the contract. Where the land is improved, yielding a yearly rent; where it appears that the property is liable to fluctuation in value, or has actually changed in value; or where the vendee has, by his acquiescence or otherwise, treated the contract as rescinded;—in these and other cases courts have held, in the absence of express agreement, that time was material, and so designed by the parties: *Brown v. Haines*, 12 Ohio, 1; *Doloret v. Rothschild*, 1 Sim. & St. 590. From the price agreed to be paid in this case, however, we infer that the land was unimproved. There is nothing to show any change in the value of the land; nor that in the period intermediate between the sale and offer to pay there was any change of circumstances affecting the rights, interests, or obligations of the parties. The complainant's acquiescence in the rescission cannot fairly be inferred, for he comes, as we think, *recenti facto*, before the vendor indicates any intention of declaring the contract at an end, and proposes to pay the money, and also brings his suit. In addition to this, the vendee had contracted to pay the highest rate of interest known to our law; and as compensation, and not forfeiture, is the doctrine of equity, we see nothing so far to justify the conclusion that this contract was forfeited by the non-payment of the money on the day it became due.

We are, then, next to consider whether the complainant was guilty of such negligence in his offer to pay the purchase money as to forfeit all right to claim a specific performance. And what we have said as to the other points in the case is in many respects applicable here. Generally, where no claim of avoidance is in the contract, or where time is not made material by implication, or the avowed object of the parties, specific performance may be granted, as we have seen, on the sound discretion of the chancellor: *Wynn v. Morgan*, 7 Ves. 202; *Dakin v. Cope*, 2 Russ. 170.

In this case, the bill avers that the vendor was continuously a non-resident of the state at the time the notes became due; and that neither he, nor any person for him, was at the place of payment to demand payment. He at no time notified the vendee that he should insist upon a strict compliance with the contract, nor did he at any time, even so late as April, 1855, when the suit was instituted, return or offer to return the complainant's notes, which, for aught that appears to the contrary, he still holds, or may have assigned to an innocent holder. Within three months after the last note became due, the complainant, at the place where the notes were to be paid, and to the person who acted as respondent's agent in making the contract, offered to perform the contract on his part, and demanded the deed. This agent's authority had been previously revoked, for what purpose does not appear, nor is it perhaps material. Within six months thereafter he institutes this suit, and proffers the money by his bill, and avers that he brings it into court. For aught that appears, the parties are in the same situation as to this property that they were on the day of the sale; the vendor has not disposed of it, or in any manner treated the contract as forfeited, nor does it appear that any material injury has resulted to him from the delay; and we think no equitable rule will be violated in requiring him to convey this land, unless the complainant's bill is defective for the other reasons specified in the demurrer and urged in argument, which we now proceed to consider. Was it necessary that complainant should have tendered to respondent a deed for execution before bringing this suit? We think not. The English rule has never been adopted in this state, but on the contrary, has been held not to prevail: *Carson v. Lucore*, 1 G. Greene, 33; *Powers v. Bridges*, Id. 235.

In the third and last place, we are to consider the objection relating to the tender of the money to complainant. There can be no doubt of the general doctrine, that before a vendee can ask a

specific performance of a contract, he must have performed or offered to perform whatever the contract has made a condition precedent on his part. Thus, ordinarily, money is to be paid or offered, where such is the contract; and so of anything else devolving upon the party by his agreement. And this is all that is determined by the brief case of *Castleman v. Harris*, 1 Smith (Ind.), 125, referred to by respondent; but the general doctrine is abundantly sustained by authority: *Washburn v. Dewey*, 17 Vt. 92; *Greenup v. Strong*, 1 Bibb, 590; *Bearden v. Wood*, 1 A. K. Marsh. 450; *Colson v. Thompson*, 2 Wheat. 336; 1 Story's Eq. Jur., sec. 771.

But even this general rule will be found not to be of universal application. One exception is, where the vendor has put it out of his power to comply, or rendered it unnecessary by refusing to convey; another, where the terms of the agreement are incapable of being strictly complied with; another, where the parties have, subsequently to the agreement, expressly or impliedly, waived the precedent performance. Other courts, again, have gone so far as to hold that an offer to perform at the time of suit brought, and the bringing the money into court, ready for the vendor, will be sufficient, subject the question of costs. And we are by no means prepared to say that we should refuse relief, merely upon the ground that a previous tender was not proved, if the complainant brought his money into court, subject to the respondent's control, giving to the vendor compensation for any costs incurred or injury sustained, and which costs or injury, it should appear, might have been avoided by the tender or offer to perform. It is not necessary, however, to place the decision of this case upon this latter ground. The bill alleges that the notes were to be paid at McGregor's office; that respondent was a non-resident of the state, and had revoked the power of the agent to receive the money. He applied, within a reasonable time after the maturity of the notes, at the proper place, to pay them, and demanded the deed. No person was there to receive the one or execute the other. He was not bound to follow the vendor to his residence in New York to make a tender. It was so far unreasonable, if not impracticable, to exact this, that equity and good conscience will not require it. Where the holder of an instrument is absent from the state when it becomes due, the maker may tender payment at the last residence or place of business of the payee before the instrument became due, and if there be no person authorized to receive the same, the maker may deposit the money with the

clerk of the district court of the proper county, and the maker shall be liable for no interest from that time: Code, sec. 958.

Now, while this provision does not in terms apply where the payee has never had a residence in the state after the note was given, yet by a fair and equitable analogy it might be well implied. In this case the maker avers that he brings the money into court, and there is, therefore, a virtual deposit with the clerk, subject to the control of the payee. But without the aid of the statute, we do not think that the maker was bound to follow the payee, in order to proffer to him, in person, a performance of the contract; and that, therefore, without reference to his offer to pay at the office of the agent, he is excused for not making the tender. That offer is only material as showing a disposition to fulfill his contract, and that he did not design to abandon it. We would not encourage a disregard of the binding obligation of contracts, nor sanction the idea that parties may at their own pleasure at any time offer to perform them. By their agreements as to time, as in all other things, they should be bound, and it is no part of our duty to make a contract for them. But where time is not made of the essence of the contract, either expressly or by fair implication; where the vendor holds the notes given for the purchase money, and gives no notice, actual or constructive, of his intention to treat the contract as abandoned; where there is no change in the circumstances of the parties, or ought to indicate that any damages have resulted to the vendor from the delay, and the vendee, within a reasonable time, manifests a disposition to pay his money and perform his contract, and follows it up by bringing his suit, we can find no case that would deny him relief, and we are unwilling to be the first to establish the precedent.

Decree affirmed.

SPECIFIC PERFORMANCE IS NOT MATTER OF COURSE, BUT IS WITHIN SOUND DISCRETION OF COURT: *Trigg v. Read*, 42 Am. Dec. 447; *Bryan v. Loftus*, 39 Id. 242; *Seymour v. Delancy*, 15 Id. 270; *Grundy v. Edwards*, 23 Id. 409; see *Hart v. Brand*, 10 Id. 715; *Aday v. Echole*, 52 Id. 225; *Parrill v. McKinley*, 58 Id. 212. The principal case is cited to this effect in *Auter v. Miller*, 18 Iowa, 412; *Smith v. Shepherd*, 36 Id. 234; *Sweeney v. O'Hora*, 43 Id. 39.

TIME MAY BE MADE OF ESSENCE OF CONTRACT by express stipulation or by peculiar nature and conditions of contract: *Garretson v. Vanloon*, 54 Am. Dec. 492; *Wells v. Smith*, 31 Id. 274; *Kirby v. Harrison*, 59 Id. 677; *Jones v. Robbins*, 50 Id. 593, and cases cited in the notes. See also *Shinn v. Roberts*, 43 Id. 636; *Curtis v. Blair*, 59 Id. 257; *Andrews v. Sullivan*, 43 Id. 53; *Rogers v. Saunders*, 33 Id. 635. The principal case is cited to the point that where time is made of the essence of the contract by express stipulation, the parties

must be held to a strict compliance therewith: *Davis v. Stevens*, 3 Iowa, 161; *Prince v. Griffin*, 27 Id. 519. An agreement that if the vendee failed to make any of the payments pursuant to the agreement, or should otherwise break the same, the vendor was at liberty to consider the same forfeited, and had the right to enter upon the premises, did not, on the authority of the principal case, make time the essence of the contract: *Armstrong v. Pierson*, 5 Id. 323, 336. Time will not be essential where circumstances of a reasonable nature have prevented a party from compliance in that particular: *Garretson v. Vanloon*, 54 Id. 492. See also, upon when time is of the essence of a contract, the note to *Jones v. Robbins*, 50 Id. 597; *Johnson v. Evans*, Id. 675-678.

LACHES MAY BE IMPUTED TO PARTY SEEKING SPECIFIC PERFORMANCE, WHEN: *De Cordova v. Smith*, 58 Am. Dec. 136; *Lewis v. Woods*, 34 Id. 110; *Rogers v. Saunders*, 33 Id. 635; *Patterson v. Martz*, 34 Id. 474; *Bryan v. Loftus*, 39 Id. 242; *Kirby v. Harrison*, 59 Id. 677; *Andrews v. Sullivan*, 43 Id. 53, and cases cited in the note. See *Laverty v. Hall*, 19 Iowa, 529, citing the principal case upon this point.

SPECIFIC PERFORMANCE WILL NOT BE DECREED WHEN PARTY APPLYING HAS NOT PERFORMED his part of the agreement at the time appointed, unless the delay is excused: *Lewis v. Woods*, 34 Am. Dec. 110; *Rogers v. Saunders*, 33 Id. 635; *Kirby v. Harrison*, 59 Id. 677; *De Cordova v. Smith*, 58 Id. 136; *Jones v. Robbins*, 50 Id. 593; *Patterson v. Martz*, 34 Id. 474, and cases cited in the notes; see notes to *Esets v. Browning*, 60 Id. 244; *Smith v. Thompson*, 64 Id. 130-134. And in general, the party seeking specific performance must show that he has taken all proper steps towards performance on his part: *Rogers v. Saunders*, 33 Id. 635; *Hoer v. Simmons*, 52 Id. 291; *Wells v. Smith*, 31 Id. 274. There must be an averment of performance or offer to perform: *Garretson v. Vanloon*, 54 Id. 592; *Chess's Appeal*, 45 Id. 668. The principal case is cited upon what laches of the vendee will prevent his obtaining specific performance. As a general rule, before a vendee can ask for specific performance, he must have performed or offered to perform whatever the contract has made a condition precedent on his part; but one exception is where the vendor has put it out of his power to comply: *Laverty v. Hall*, 19 Iowa, 529. Where payment or tender is not necessary to enable the plaintiff to maintain the action, it need not be averred: *Washburn v. Carmichael*, 32 Id. 478, citing the principal case.

VENDEE NEED NOT AVER TENDER OF DEED TO VENDOR FOR EXECUTION in his plea to an action by the vendor for the purchase money: *Smith v. Henry*, 44 Am. Dec. 540; *Walling v. Kinnard*, 60 Id. 216; see *Wells v. Smith*, 31 Id. 274; *Salmon v. Hoffman*, 56 Id. 322; see note to *Johnson v. Evans*, 50 Id. 673. In *Rutherford v. Haven*, 11 Iowa, 587, it is held that the vendor seeking specific performance is not required, as at law, to tender a deed before commencing his suit, for equity will protect the rights of the vendee; and this is said to be the reasoning of the principal case.

NOTICE BY PARTY TO COMPEL FULFILLMENT OR ABANDONMENT OF CONTRACT: See note to *Johnson v. Evans*, 50 Am. Dec. 678, 679. In *Mullin v. Blocker*, 11 Iowa, 380, it was held that a contract for the conveyance of real estate cannot be rescinded by the vendee without the performance of some act which will give the vendor notice of his intention, and put him upon his guard, citing the principal case.

SANTO v. STATE.

[2 IOWA, 165.]

STATES MAY PROTECT THEMSELVES FROM EVILS OF PAUPERISM, IMMORALITY, AND CRIME.**STATE MAY PROHIBIT SALE OF SPIRITS WITHIN ITS BORDERS** as a police or internal regulation, excepting only the case of the importer of foreign spirits selling in the original quantities imported.**IOWA LIQUOR LAW OF 1855 IS NOT IN CONFLICT WITH CONSTITUTION OR LAWS OF THE UNITED STATES.****LEGISLATURE CANNOT LEGALLY SUBMIT TO PEOPLE PROPOSITION WHETHER ACT SHOULD BECOME LAW OR NOT,** except where acts of incorporation are submitted to the acceptance of the corporators, whether private or municipal.**PEOPLE HAVE NO POWER, IN THEIR PRIMARY AND INDIVIDUAL CAPACITY, TO MAKE LAWS,** that power being vested in the legislature.**ACT VOID IN PART IS NOT NECESSARILY VOID ALTOGETHER.** If sufficient remains to effect its object without the aid of the invalid portion, the latter only shall be rejected, and the former shall stand.**ACT COMPLETE IN ALL ITS PARTS WITHOUT SECTION THAT SUBMITS ACT TO VOTE OF PEOPLE** is not wholly unconstitutional and void, but such section only, and a vote taken thereon is merely nugatory.**IOWA LIQUOR LAW OF 1855 IS NOT WHOLLY UNCONSTITUTIONAL BECAUSE OF EIGHTEENTH SECTION** submitting it to vote of people, even if it would have been wholly void had that section distinctly put to a vote of the people whether the act should become a law or not, for that section provides merely that the act shall become a law if a majority of the votes cast be in its favor, and fails to enact that if the vote be against it it shall not become a law.**POWER OF JUDICIAL TO DECLARE ACT UNCONSTITUTIONAL** is of the most delicate and responsible nature, and not to be resorted to unless the case be clear, decisive, and unavoidable.**COURT SHOULD GIVE ACT SUCH CONSTRUCTION, IF POSSIBLE, AS WILL MAINTAIN ITS CONSTITUTIONALITY.****SECTION OF STATUTE THAT PROHIBITS LIQUOR-SELLING,** providing that vote of people for and against the act shall be taken, and if a majority be in favor of it it shall become a law, but omitting to provide that if the vote be against it it shall not become a law, is not unconstitutional, for the legislature may have designed to ascertain merely the moral sentiment of the people upon the subject of prohibition.**WHEN LANGUAGE AND PROVISIONS OF ACT ARE CONSISTENT WITH LAWFUL END,** and this is its apparent meaning, whilst another construction would give it an unlawful effect, it is the duty of a court to take that view which is lawful and consistent.**ACT IS NOT IN VIOLATION OF CONSTITUTIONAL PROVISION THAT EVERY LAW SHALL EMBRACE BUT ONE OBJECT,** which shall be expressed in the title, although it embrace several ideas or steps in the progress of its provisions toward the attainment of the main object expressed in the title. This object may be a broader or a narrower one, but if the several steps embraced in it are fairly conducive to that end or object, it is still a unit.

IOWA STATUTE OF 1855, ENTITLED "ACT FOR SUPPRESSION OF INTEMPERANCE," does not embrace more than one object, which is expressed in the title.

OBJECTION THAT STATUTE WAS NOT PUBLISHED AS REQUIRED BY CONSTITUTION IS NOT MAINTAINABLE when the constitution provides that a law shall not take effect until published and circulated, but gives no detailed directions, and the code provides that such acts shall take effect on the first day of July following the session, and the act in question was actually published in the volume of session laws before the first day of July following the session. The act took effect on that day by virtue of these general provisions.

PART OF ACT MAY BE MADE TO TAKE EFFECT UPON PUBLICATION IN NEWSPAPERS, under constitutional provision that if the legislature deem a law of immediate importance they may provide that it take effect by publication in newspapers.

ACT AUTHORIZING SEARCH-WARRANT IS NOT UNCONSTITUTIONAL, on ground that it does not require particular description of place to be searched or property to be seized, when it requires the place, person, and property to be described "as particularly as may be."

ACT REQUIRING CHARGE TO BE MADE IN LIKE MANNER AS IS REQUIRED IN RELATION TO OTHER OFFENSES, but giving no especial directions, is not unconstitutional on the ground that the charge is not required to be distinctly and fully made.

ACT IS NOT UNCONSTITUTIONAL ON GROUND THAT IT AUTHORIZES CRIMINAL PROSECUTION, and that it is not made necessary to inform the defendant, and that he has not the right to be confronted with witnesses, although it does not require an arrest, if it requires a notice to him as effectual in substance as when he is sued for any amount of indebtedness and allows him to be confronted with witnesses.

IOWA LIQUOR LAW OF 1855 REQUIRES NOTICE TO DEFENDANT AND TRIAL, and is therefore not open to the constitutional objection that it authorizes a forfeiture or destruction of property, without notifying the defendant or without trial, and as a penalty for crime which need not be proved.

ACT IS NOT UNCONSTITUTIONAL, ON GROUND THAT IT PRESUMES GUILT OF ACCUSED, or inflicts penalty for a crime without proof, where it provides that proof of finding the liquor named in the possession of the accused, in any place except his private dwelling-house or its dependencies, shall be received and acted upon as presumptive evidence that such liquor was kept or held for sale contrary to the provisions of the act.

ACT GIVING JUSTICE OF PEACE JURISDICTION OF OFFENSE IS NOT UNCONSTITUTIONAL because incidentally he may obtain cognizance of property of an undefined amount.

AUTHORIZATION OF SEARCH-WARRANT IS NOT "UNREASONABLE," so as to be unconstitutional, when it is authorized for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause.

FORFEITURE OF PROPERTY, TRAFFIC IN WHICH IS DETRIMENTAL AND DANGEROUS to public health, safety, happiness, and morals, is not a taking of private property for public use.

MUNICIPAL CHARTER CONFERRING UPON MAYOR JURISDICTION OF JUSTICE OF PEACE under the criminal laws of the state is not in conflict with the

constitutional provision that no person charged with the exercise of powers properly belonging to one department of the government shall exercise any of the functions appertaining to either of the others. The "departments" are those of the state government, and the mayor is not a part of the state government.

CORPORATE SEAL OF TOWN IS NOT SEAL OF MAYOR AS JUSTICE OF PEACE, and need not be appended to a warrant issued by him in that capacity; nor is his court a court of record.

PEACE-OFFICERS ARE NOT PROHIBITED FROM MAKING COMPLAINT OF VIOLATION OF PENAL LAWS by statute providing that no sheriff, deputy sheriff, coroner, or constable shall appear as attorney or counsel for any one, nor make any writing or process to commence a suit or proceeding.

OBJECTION TO INFORMATION AND WARRANT, THAT CERTAIN MATTERS THEREIN CONTAINED ARE NOT PARTICULARLY DESCRIBED, cannot, after appearance and trial in the lower court, be taken in appellate court for the first time.

DISTRICT COURT OF IOWA MAY, UPON APPEAL FROM JUSTICE'S COURT, refuse to grant a new trial, and refuse a trial by jury.

ASSIGNMENT OF ERROR IS TOO BROAD, AND WILL NOT BE NOTICED BY APPELLATE COURT, when framed as follows: "In overruling various other motions and questions apparent upon the record, which is made part and parcel of this assignment of errors."

INFORMATION under the act of 1855, entitled "An act for the suppression of intemperance," was filed against Geofas Santo, charging him with keeping intoxicating liquors for sale in the city of Keokuk, in violation of the provisions of the statute. The information was duly signed by three residents of the county, one of whom, M. P. Landon, was, however, the marshal of the city of Keokuk. It was subscribed and sworn to before the mayor of Keokuk. Upon this information a warrant was issued and delivered to the marshal of Keokuk, who was directed to search the premises and seize the liquors described in the information. Under this writ the search was made, the liquor seized, and return made thereon by Landon, the marshal. Notice was then issued to Geofas Santo and all whom it may concern, requiring them to appear before the mayor on the eighth day of August next and show cause why the property seized should not be forfeited. A *venire* for a jury was also issued and served. The defendants appeared and moved to dismiss the proceedings on seventeen grounds. These sufficiently appear in the opinion. The jury returned a verdict that the liquors were kept to be sold in violation of the statute. The mayor thereupon entered judgment that the liquors were forfeited, and that they be destroyed, and that the defendants pay costs. The defendants then filed an affidavit for an appeal to the district court, relying upon the overruling of their motions.

In the district court the defendants moved that the cause be stricken from the docket and the proceedings quashed. This was overruled, and the court refused a new trial on the grounds assigned as errors in the affidavit of appeal, and refused a jury trial, which the defendants demanded. The court then affirmed the judgment of the mayor. The defendants then sued out a writ of error to this court, the assignments of which sufficiently appear from the opinion.

Marshall and Moss, for the plaintiffs in error.

J. P. Hornish and David C. Cloud, attorney general, for the state.

By Court, WOODWARD, J. This case arises under the act entitled "An act for the suppression of intemperance," approved January 22, 1855; and thus are raised among us some interesting questions which have been so considerably discussed in several of our sister states. These questions are approached with all the sense of responsibility, and with all the solicitude for the attainment of right, which belong to their nature and their importance. Such are their well-known relations, and such the interest felt by the public in the possible fate of this act of the general assembly, that these are the last questions, and this the last occasion, upon which we should venture to indulge in theorizing or to reason upon merely theoretic grounds. This mode of treating the subject would be not only unsafe for a judicial tribunal, but also unsatisfactory to other minds. Such has been found to be the case in respect to several opinions upon some one or other of the questions involved.

All acknowledge the great principles, and probably the lesser rules also, by which these cases must be tried; but the main difficulty in this, as in many legal matters, lies in the just and true application of those principles and rules about which there is no dispute. To make this just application in the matter at bar, it is more than usually necessary to keep near to and within sight of the well-known shores; to sail in waters which have been often navigated, and not launch out into the broad sea of speculation upon human rights. That which all the states have been accustomed to do, those things which have commonly been held right, those decisions which courts have made in past time in reference to other subjects of an analogous nature, or involving similar principles, must be our guides. This is the only course which will satisfy the mind of the lawyer or of any other thinking man.

It is often true that a proposition is seen, felt, and admitted to be true, whilst it is difficult to point out the process of reasoning which leads to or supports it, or to answer arguments which may be urged against it. This is true of many of the maxims lying at the basis of our political being. Who would doubt the proposition that any one of our state governments has the rightful power to protect itself or its public, the community, from the evils of pauperism, immorality, and crime? And yet how extensive and how difficult the range of argument through which the question carries us! The states have always exercised this power, and it has not been questioned until it came to be applied to intoxicating liquors, the vast evils of the use of which have been more especially observed within the past generation. If the states have not this power rightfully, the statute-books of all of them are lumbered by a mass of matter which has no place there; and if the power cannot be applied to this subject, it will be difficult to show the reasoning by which it can be applied to some others, to which it has always been applied, without doubting. It cannot be a question of degree, it is one of power or right.

There is no statistical or economical proposition better established, nor one to which a more general assent is given by reading and intelligent minds, than this, that the use of intoxicating liquors as a drink is the cause of more want, pauperism, suffering, crime, and public expense than any other cause, and perhaps it should be said, than all other causes combined. Even those who are opposed to restriction oftentimes admit this truth. Every state applies the most stringent legal power to lotteries, gambling, keeping gambling-houses and implements, and to debauchery and obscenity, and no one questions the right and the justness of it; and yet how small is the weight of woe produced by all these united, when compared with that which is created by the use of intoxicating drinks alone! If by any process of reasoning the state or the country is bound to support the pauper, to maintain a judicial system in order to protect the community from crime, and to confine and maintain the criminal, then how is it possible to say that she cannot look to the causes and sources of poverty and crime, and cut them off or dry them up? But the right of these our civil communities to protect themselves against intoxicating drinks is denied, and for this there are two processes of reasoning. The one is that the liquors are property, and that the right to make and the right to sell are inherent in, or incident to, the right of prop-

erty. The other is that the laws of the United States permit the importation; the right to import carries the right to sell, at least in original packages; the right to sell in bulk implies the right to buy, and the right to break bulk and sell by retail follows. If this reasoning and this result are correct, then, indeed, are the states helpless. They have not one of the most necessary attributes of sovereignty, and even of individual right—that of self-protection; and state sovereignty is a fancy. Then, neither state nor United States can exercise this power, which is always admitted to belong to every independent community.

But the argument in the case at bar stands thus: this is a limited, a constitutional government, and although the people may, yet the legislature, under the constitution, does not, possess the power here claimed. We proceed to consider this question, keeping as near as possible to the beaten paths. Let us see what doctrines have been held in some cases, which may serve both as an answer to objections, and as a basis for our own reasoning.

In the case of *Fisher v. McGirr*, *Commonwealth v. Albro*, *Herrick v. Smith*, 1 Gray, 1 [61 Am. Dec. 381], Shaw, C.J., says: "We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places and under particular circumstances, to be unlawful, because they would be injurious, dangerous, or noxious; and by due process of law, by proceedings *in rem*, to provide both for the abatement of the nuisance, and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles. Therefore, as well to abate the nuisance as to punish the offending or careless owner, the property may be justly declared forfeited, and either sold for the public benefit, or destroyed, as the circumstances of the case may require and the wisdom of the legislature direct. Besides, the actual seizure of the property intended to be offensively used may be effected, when it would not be practicable to detect and punish the offender personally."

This able judge then states the question to be, "whether the measures directed and authorized by the statute in question [the Massachusetts act] are so far inconsistent with the principles of justice and the established maxims of jurisprudence, intended for the security of public and private rights, or so repugnant to the declaration of rights and the constitution that it was not within the power of the legislature to give them the

force of law, and that they must be held unconstitutional and void;" and that court were all of opinion that they were. These cases are referred to at this time on account of the above views, and because these views are all that are required for such a law to stand upon; and are thus unequivocally set forth by that court, in cases which are cited and relied upon, apparently with confidence, as conclusive against the act before us. The points upon which those cases were decided, and the differences between the Massachusetts and Iowa acts, will be noticed hereafter.

There have been some cases determined in the supreme court of the United States, also, upon laws enacted upon this same subject, which command our attention. We are not unmindful of the distinction which has been so urgently pressed in relation to them, that they determine the rights of the states only under the constitution and laws of the United States, but do not touch upon their powers under their own constitutions. This is true. Yet in those cases are thoughts and reasoning upon the powers of the states in relation to these subjects, which, coming from that tribunal, are entitled to our deepest respect and gravest consideration. And it would be puerile to pretend not to see nor regard the reasoning of that branch, even in cases where they are not to be cited as authority. As we quote commentators and elementary writers, so *a fortiori* would we resort to the fountains from which the elementary writers themselves draw.

In the case of *New York v. Miln*, 11 Pet. 102, the supreme court say that "it is not only the right, but the bounden and solemn duty of a state to advance the happiness, the safety, and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all those powers which relate to merely municipal legislation, or what may perhaps be more properly called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

The considerations and reasoning in the cases of *Thurlow v. State of Massachusetts*, *Fletcher v. State of Rhode Island*, and *Pierce v. State of New Hampshire*, 5 How. 504, are very important in their bearings upon the present law of Iowa. The Mas-

sachusetts law prohibits a sale of liquors without license in a quantity less than twenty-eight gallons, which was a quantity greater than the law of the United States permitted to be imported in kegs. The Rhode Island law forbade a sale without license in a quantity less than ten gallons, which was a quantity greater than the law of the United States permitted to be imported in bottles. The New Hampshire law forbade a sale in any quantity without license. Neither of the cases was against an importer. The first two cases related to foreign liquors imported. The New Hampshire case related to liquor of domestic production, transported coast-wise from one state to another, viz., from Massachusetts to New Hampshire. The objections to these laws were based upon those provisions of the constitution, article 1, section 8, clause 3, and section 10, which prohibit a state laying imports or duties upon importations, and giving to congress the power to regulate commerce with foreign nations and among the states. The constitutionality of each of these laws was maintained. But such was the importance of the cases, and such the difference of the train of reasons by which the supreme judges arrived at their conclusions, severally, that they nearly all gave their views in one or more separate opinions. And in these are views and reasons which help us on to a conclusion on the various points made in the case at bar.

Chief Justice Taney says: "These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a state is bound to receive, and to permit the sale by the importer, of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper:" Id., 5 How. 577.

Mr. Justice McLean says: "The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or

morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and in extreme cases it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power of self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin or approached by poison. And it is the settled construction of every regulation of commerce, that under the sanction of its general laws no person can introduce into a community malignant diseases, nor anything which contaminates its morals or endangers its safety. And this is an acknowledged principle, applicable to all general regulations. Individuals, in the enjoyment of their own rights, must be careful not to injure the rights of others.

"The police power of a state and the foreign commercial power of congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse; the other upon the internal concerns of a state. The former ceases when the foreign product becomes commingled with the other property of the state. At this point the local law attaches and regulates it, as it does other property. A state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, nor impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the state, either specifically or in the form of a license to sell. A license may be required to sell foreign articles when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a state may, in the exercise of that great conservative power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. * * * When, in the appropriate exercise of these federal and state powers, contingently and incidentally, their lines of action run into each other, if the state power be necessary to the preservation of the morals, health, or safety of

the community, it must be maintained. But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial result. By preserving, as far as possible, the health, the safety, and the moral energies of society, its prosperity is advanced."

Justice Catron, who may be considered as the least favorable in his reasoning to the general views expressed above, in the same cases, says: "I admit as inevitable that if the state has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether if such be her policy; and that if this court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce, as already defined." And he held that the states had the power of restraint by licenses, and consequently of prohibition, until congress should pass some act regulating commerce between the states. These remarks were made in relation to the New Hampshire case, the law of which state forbade sales at all without a license including the importer in its terms, but in which case the judge considered the liquors as standing upon the same ground as domestic liquors.

Mr. Justice Daniel gives a greater latitude to the rights of the states than the other members of that eminent court, and dissents from some restraints put upon the states by the court in the case of *Brown v. Maryland*, 12 Wheat. 419. In relation to the cases before that court, he says: "Every power delegated to the federal government must be expounded in coincidence with the possession by the states of every power and right necessary for their existence and preservation. * * * The power to regulate this commerce [foreign] may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which it may, as a foreign commerce, be carried on; but precisely at that point of its existence that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone. * * * But they [subjects of foreign commerce] must be continuing, and still in reality subjects to

foreign commerce, and such they can no longer be after that commerce with regard to them has terminated and they are completely vested as property in a citizen of a state, whether he be the first, second, or third proprietor; if this were otherwise, then by the same reasoning they would remain imports, or subjects of foreign commerce, through every possible transmission of title, because they had been once imported. * * * It cannot be correctly maintained that state laws which may remotely or incidentally affect foreign commerce are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some other power clearly vested in congress by the constitution; and, I would add, with some regulation actually established by congress in virtue of that power. In the case of *Brown v. Maryland*, *supra*, it is said by the court that liberty to import implies unqualified liberty to sell at the place of importation. In the argument of this case the proposition just mentioned does not, in all its amplitude, seem broad enough for counsel, who have contended that liberty to import implies, on the part of the states, a duty to encourage, if not to enforce, the consumption of foreign merchandise, arising, it is affirmed, from a further duty incumbent on the states to regard, *a priori*, the acts of the federal government as wisest and best, and therefore imposing an obligation on the states for co-operation with them. These very exacting propositions, it is believed, can hardly be vindicated, either by the legitimate meaning of words or any correct theory of the constitutional powers of congress. * * * When importations may have been made with the direct view to sell, it does not follow, by necessary induction, that permission for the former to import implies permission for the latter to sell, nor the power of granting the former the power of confining the latter; much less that it implies the power or the obligation on the part of the government to command or insure a sale."

It was upon this point of the implied right of the importer to sell that Justice Daniel differed from the court. In relation to the argument that the importer pays a duty to the government for the permission to introduce and vend his merchandise, he says: "In truth, no such right as the one supposed is purchased by the importer, and no injury, in any accurate sense, is inflicted on him by denying to him the power demanded. He has, doubtless, in view the profits resulting from the sale of his commodities, but he has not purchased, and cannot purchase, from the government that which it could not insure to him—a

sale independently of the laws and polity of the states. He has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import or introduce his merchandise—the right to come in with it in quest of a market, and nothing beyond this. The habits, the tastes, the necessities, the health, the morals, and the safety of society form the true foundation of his calculations, or of any power or right which may be conceded to him for the sale of his merchandise, and not any supposed right in the federal government, in contravention of all these, to enforce such sale. * * * These stipulations [in treaties] no more signify that commodities shall be circulated and used free of all internal regulation than they convey a positive mandate for their being purchased and consumed, eaten and drank, *nolens volens*, or at all events. Every state that is in any sense sovereign and independent possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction, and in virtue and under the protection of its own laws, whether that control be exercised in taxing it, or in determining its tenure, or in directing the manner of its transmission; and this, too, irrespective of the quantities in which it is held or transferred, or the sources whence it may have been derived."

In the same cases, Mr. Judge Woodbury says: "It is not enough to fancy some remote or indirect repugnance to acts of congress, a 'potential inconvenience,' in order to annul the laws of sovereign states and overturn the deliberate decisions of state tribunals. There must be an actual collision, a direct inconsistency, and that deprecated case of 'clashing sovereignties,' in order to demand the judicial interference of this court to reconcile them: *McCulloch v. Maryland*, 4 Wheat. 316; 1 Story on Const. 432.

"And what power or measure of the general government would a prohibition of sales within a state conflict with if it consisted merely in regulations of the police or internal commerce of the state itself? * * * The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also of revenue which would otherwise accrue from foreign imports, or from those of that particular article." This able judge further says: "But I go further on this point than some of the court, and wish to meet the case in point, and in its

worst bearings. If, as in the view of some, these license laws were really in the nature of partial or entire prohibition to sell certain articles within the limits of a state, as being dangerous to public health and morals, or were virtual taxes on them as state property in a fair ratio with other taxation, it does not seem to me that their conflict with the constitution would by any means be clear. Taking for granted, till the contrary appears, that the real design in passing them for such purposes is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons or things except where, within the limits of state territory, they would appear entirely defensible as a matter of right, though prohibiting sales. * * * Whether such laws of the states as to license are to be classed as police measures or as regulations of their internal commerce, or as taxation merely imposed on local property and local business, and are to be justified by all of them together, is of little consequence, if they are laws which, from their nature and object, must belong to all sovereign states. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the states, no express grant of them to the general government having been either properly or apparently embraced in the constitution. So whether they conflict or not, indirectly and slightly, with some regulations of foreign commerce, after the subject-matter of that commerce touches the soil or waters within the limits of a state, is not perhaps very material, if they do not really relate to that commerce, nor any other topic within the jurisdiction of the general government.

"As a general rule, the power of a state over all matters not granted away must be as full in the bays, ports, and harbors within her territory, *infra fauces terræ*, as on her wharves or shores or interior soil. And there can be little check on such legislation beyond the discretion of each state, if we consider the great, conservative, reserved powers of the states, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace or their morals. * * * It is the undoubted and reserved power of every state here, as a political body, to decide independent of any provisions made by congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become

its residents, who its citizens, who enjoy the privileges of its laws and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect. And no one government, or its agents or navigators, possesses any right to make another state, against its consent, a penitentiary or hospital or poor-house farm for its wretched outcasts, or a receptacle for its poisons to health and instruments of gambling and debauchery."

Mr. Justice Grier says: "Without attempting to define what are the peculiar subjects or limits of this [the state] power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category; that is, of the authority being complete, unqualified, and exclusive. If the right to control these subjects be 'complete,' unqualified, and exclusive in the state legislature, no regulations of secondary importance can supersede or restrain their operations on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others. * * * It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power or of legislation as between the states and the United States; each is acting within its sphere and for the public good, and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand-fold in the health, wealth, and happiness of the people."

Thus are given quotations from six of the nine judges constituting the supreme bench of the United States, and from each one who prepared an opinion. If any apology is needed for the amplitude of these quotations, let it be found in the importance of the subject, and in the general want of correct information in respect to the views of that court upon these subjects. Obtaining right notions of those views, we are enlightened upon the questions before us and upon such similar ones as may arise. It is cheering to find in these opinions that the reasoning of some courts even receives no countenance from that bench; and that the rights conceded to the importer are not considered as

carrying with them such a train of consequences as has sometimes been held—consequences which take from a state the right of self-protection.

Let us now see what that court has judicially held, which bears upon the questions before us. The case of *Brown v. Maryland*, 12 Wheat. 419, was brought against the importer of dry goods. The state law required such importer to take out and pay for a license to sell. It was held that the importer had a right to sell his imported goods in their original packages without further tax than the duties required by the law of congress, and that the state law imposing a tax for a license was invalid. In *Gibbons v. Ogden*, 9 Id. 1, it was held that the power to regulate commerce between the states, given to congress by the constitution, was not exclusive in congress until exercised; nor, perhaps, until there was a collision between regulations made by congress and by a state. And the same view was taken in *Wilson v. Blackbird Creek Marsh Company*, 2 Pet. 251.

In the above cases of *Fletcher v. Rhode Island* and *Thurlow v. Massachusetts*, 5 How. 504, it was held that laws requiring a license to be obtained before selling liquors (including foreign and imported) in less quantities than ten and twenty-eight gallons were constitutional and valid. In *Pierce v. New Hampshire*, Id., it was held that a law requiring a license to be obtained (which license might be refused) before the sale of liquors in any quantity was valid and constitutional when applied to liquors imported from another of these states; congress having made no regulations in relation to commerce between the states. In the above three license cases all of the six judges who delivered opinions recognize the authority of a state to prohibit the sale of spirits within its borders, as a police or internal regulation, excepting only the importer of foreign spirits selling in the original quantities imported. There has been nothing decided, then, by the supreme court of the United States, with which the prohibitory law of Iowa conflicts. That act prohibits the sale of intoxicating liquors in any quantity; but it saves the case of the importer. The objection, therefore, that this act is in conflict with the constitution or laws of the United States is not well taken.

The second class of objections urged against the act under consideration is that in several of its provisions, or omissions to make provisions, it is a violation of some requirements of the constitution of the state, or of its spirit and meaning. As two of the objections in this class are of a nature quite different from

the others, it will be convenient to consider them by themselves. These are: 1. "That the statute under which the proceedings are commenced is not a valid and existing law of Iowa, nor can be; for that the legislature of the state, in the making thereof, delegated the power of its taking effect to the contingency of a vote of the people in its favor;" 2. "That no publication of said law has been had, as the constitution of the state requires."

We will first consider the question relating to the submission of an act to a vote of the people; and on this subject we entertain no doubts. The general assembly cannot legally submit to the people the proposition whether an act should become a law or not; and the people have no power, in their primary or individual capacity, to make laws. They do this by representatives. There is no doubt of the authority of the legislature to pass an act to take effect upon a contingency. But what is a contingency, in this sense and connection? It is some event independent of the will of the law-making power, as exercised in making the law, or some event over which the legislature has not control.

For instance, the embargo laws and their cessation were made to depend upon the action of foreign powers in relation to certain decrees. The will of the law-maker is not a contingency in relation to himself. It may be such in relation to another and external power, but to call it so in relation to himself is an abuse of language. Now, if the people are to say whether or not an act shall become a law, they become, or are put in the place of, the law-maker. And here is the constitutional objection. Their will is not a contingency upon which certain things are, or are not, to be done under the law, but it becomes the determining power whether such shall be the law or not. This makes them the "legislative authority," which, by the constitution, is vested in the senate and house of representatives, and not in the people.

It cannot be considered necessary to argue concerning the submission of acts of incorporation to the acceptance of the corporators. These are private matters, and not a part of the public law of the land. It is a question of private interest only whether certain persons shall become a corporation; and, in the case of a strictly private one, probably the legislature could not make them such against their assent. And in the case of municipal corporations, they are, in the legal sense, private; and so they are in a common sense, to all practical intents.

It is a question for the local community alone to determine

whether they will be incorporated, or whether they will be so as a town or city. This distinction is made practically, always and everywhere, whether it be founded in strict logic or not. The constitution prescribes the manner in which bills shall become laws, and acts or laws can be enacted in no other way. A certain body or department is created for this purpose, and no other has the smallest authority in that respect. Article 3 of the constitution is, in part, as follows: "The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial. The legislative authority of this state shall be vested in a senate and a house of representatives, which shall be designated the general assembly of the state of Iowa; and the style of their laws shall be: 'Be it enacted by the general assembly of the state of Iowa.'" How is a law enacted? Section 16 of the same article directs that "bills may originate in either house, except," etc.; and "every bill, having passed both houses, shall be signed by the speaker and president of their respective houses." And section 17 provides that "every bill which shall have passed the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it with his objections," etc. Then follow directions as to how it shall become a law, notwithstanding the governor's objections. It will be observed that there are under the constitution but three departments of the government; that the legislative department consists of the senate and house of representatives, and the people do not constitute a portion of it; and that laws are enacted "by the general assembly." This is the mode provided by the constitution for making laws. A bill becomes an act or a law in the above manner, or it never becomes such. A vote of the people cannot make it become a law, nor can it prevent it becoming one. After a bill has thus passed the two houses, and received the approval of the governor, and thus becomes a law by the constitution, how can a vote of the people affect it? As well might this court submit the decision of these causes to a vote of the people of the state, or of a judicial district; or the governor his pardoning power. If there is any efficacy in a vote of the people in passing a law, then, of course, it can be repealed only by a vote.

What effect, then, had the vote of the people? None at all, in a legal sense or manner. The constitution made it an act of the general assembly when it had passed the two houses and received the proper signatures. But it is argued that the eight-

eenth section, submitting the act to a vote, is part of the act; and so becomes a law with the rest. The answer to this is, that if the general assembly has no authority to submit such a question, then such a provision is void, and it will follow that either the whole act or the section containing the objectionable matter is null and void. The following are authorities on both sides of the question of submitting acts to a vote of the people. The following hold it constitutional: *State of Vermont v. Parker*, 26 Vt. 357; *Johnson v. Rich*, 9 Barb. 680. The following hold it unconstitutional: *Thorne v. Cramer*, 15 Id. 112; *Bradley v. Baxter*, Id. 122; S. C., 1 Am. Law Reg. 658; *Barto v. Hinrod*, 8 N. Y. 483 [59 Am. Dec. 506]; *Rice v. Foster*, 4 Harr. (Del.) 479; *People v. Collins*, 3 Mich. 343; S. C., 2 Am. Law Reg. 591; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Parker v. Commonwealth*, 6 Id. 507 [47 Am. Dec. 480].

This leads us to the next step, which is, whether the whole act, or the eighteenth section only, is invalid. It is assumed, for the present, that the matter was submitted to the people in the largest and broadest sense. This is unconstitutional and void. But an act void in part is not necessarily void for the whole. If sufficient remains to effect its object, without the aid of the invalid portion, the latter only shall be rejected, and the former shall stand. This doctrine is clearly maintained in the Massachusetts cases: *Fisher v. McGirr*, and other cases, 1 Gray, 1 [61 Am. Dec. 381]; *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625; *State v. Cox*, 8 Ark. 436; *Commonwealth v. Kimball*, 24 Pick. 361 [35 Am. Dec. 326]; *Norris v. Boston*, 4 Met. 288; *Clark v. Ellis*, 2 Blackf. 10. Now, the prohibitory act of Iowa is a complete act in all its parts, without the eighteenth section submitting it to the people. No part depends for its efficacy or practicability on that section. It can be carried into effect as well without it as with it. That section relates to nothing but the vote, the returns, publication of the result, and like matters. Testing this act, then, by the same rules which are applied to others, we see no reason why the whole act should be declared unconstitutional and void. It was not the vote of the people which was unconstitutional, but it was the submission to the people; and that part of the act was and is invalid if it submitted the question whether it should be the law or not; and the vote was to a legal intent nugatory. It effected nothing. The act would have been law had the vote been against it. Why the courts of some states have held an act submitted to the people to be void rather than the mere act of submission, as in

the case of the New York school law, does not clearly appear. Under our constitution and laws there seems to be no difficulty, as will be shown in the next step of our inquiry.

Thus far we have spoken in gross, and without discrimination, of the submission to a vote. But if we are not correct in viewing the submission alone as the invalid part of the act, in other words, if the submission to a vote of the people renders the whole act void, then it becomes necessary to be more exact, and to see what was submitted, and in what terms or manner. Let us assume, for this part of the argument, that the whole act is rendered unconstitutional if it was submitted to the vote upon the condition that if the vote was in its favor it shall be a law, and if the vote was against it then it should not become a law. In the case of the New York free-school law, section 10 provided that "the electors shall determine by ballot, at the annual election to be held in November next, whether this act shall or shall not become a law." And section 14 was, that if a majority of the votes should be against it, then "this act shall be null and void," and if they should be in its favor, "then this act should become a law, and take effect." In this case it was distinctly put to a vote of the people whether the act should become a law or not. And if the legislature could, by any possibility, put from itself the determination of this question, it did so in that case.

But it is apprehended that the Iowa act stands quite differently. The eighteenth and last section is in substance as follows, certain parts being quoted literally: "At the April election, to be holden on the first Monday in April, A. D. 1855, the question of prohibiting the sale and manufacture of intoxicating liquor shall be submitted to the legal voters of the state;" then follow provisions concerning the election and the returns; the ballot is to be "For the prohibitory liquor law," or "Against the prohibitory liquor law;" an official statement of the result of the vote is to be made and published; "and if it shall appear from such official statement that a majority of the votes cast as aforesaid upon said question of prohibition shall be for the prohibitory liquor law, then this act shall take effect on the first day of July, A. D. 1855;" but providing that those portions of the act which relate to the election directed in this section should take effect from and after publication in the newspapers therein named. The act is signed by the president of the senate and the speaker of the house, and approved by the governor. Now, it is manifest that here is no distinct submission to the people of the question "whether this act shall or shall not

become a law," as in the New York case. It is not provided that if the vote be against it it shall not become a law, or that it shall not take effect. The provision that if the vote be for it it shall take effect on the first day of July affords some little weight of argument against this view; but it is not possible to give to the implication contained in them a weight sufficient to override the argument drawn from the provisions of the constitution relative to the passage of laws, and from the want of power in the legislature. And the more especially is this true when a fair and constitutional object for these provisions can be found, and a consistent meaning and proper effect can be given to the provisions of the act, so as to give effect to the whole.

For some time after the establishment of the state government, it was doubted whether the judiciary possessed authority to declare and hold an act of the legislature unconstitutional and void, and the exercise of the power was declined by some courts. And now, although the power is universally admitted, its exercise is considered of the most delicate and responsible nature, and it is not resorted to unless the case be clear, decisive, and unavoidable. It is the duty of the court to give an act such a construction, if possible, as will maintain it: *Rice v. Foster*, 4 Harr. (Del.) 479; *Fisher v. McGirr*, etc., 1 Gray, 1 [61 Am. Dec. 381]; *Mairee v. State*, 4 Ind. 342; *Griffith v. Commissioners of Crawford County*, *Carey v. Commissioners of Wyandot County*, 20 Ohio, Append. 1; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *State v. Cooper*, 5 Blackf. 258; *Bank of Hamilton v. Dudley*, 2 Pet. 522; *Ogden v. Saunders*, 12 Wheat. 270; *People v. Foot*, 19 Johns. 58; *Johnson v. Dalton*, 1 Cow. 543, 550 [13 Am. Dec. 564]; *Calder v. Bull*, 3 Dall. 386; *Duncanson v. McLure*, 4 Id. 308; *Fletcher v. Peck*, 6 Cranch, 87. Every lawyer knows that it is a common argument, often resorted to, against some construction of an act, that that would be giving it an unlawful, an unconstitutional, effect, and therefore the legislature did not so intend it. And this is a legitimate argument, and one which not unfrequently prevails. Certainly some more words, and negative words, are wanting in this section to compel a court to give it such a construction as will nullify the whole, or even the section alone.

But what meaning can be given it which will leave it consistent and valid? Suppose the legislature, having enacted the law, designed to ascertain the moral sentiment of the people of the state on the subject of "prohibition," in order, first, that if the community should be in favor of that policy, the law might have

the aid of the power of that public moral sentiment; and secondly, that if the public voice should be against the policy, this might be certainly ascertained and the law repealed. This would be entirely consistent with the constitution, and perfectly rational; for not only does our government peculiarly stand upon public sentiment, but it is also well understood that a law of this nature, especially, requires the aid of the public moral sense, as well as its legal authority, for its enforcement. Had this been the intent of the law-making power, it could not have used language better adapted to it, with the slight exception above alluded to; nor, indeed, could omission of language have been more appropriate. And what the act does not say is important as well as what it does say. Now, when the language and provisions of an act are consistent with a lawful end, and this is its apparent meaning, whilst another construction would give it an unlawful effect, it is the duty of a court to take that view which is lawful and consistent. In view of the rules and considerations above suggested, which are the ordinary ones applied by courts to all acts of the legislature, we are constrained to hold: 1. That the whole act is not rendered invalid, even though the submission to a vote should be held unconstitutional; 2. That the vote called for in the eighteenth section of this act was not upon the question whether it should become a law or not, and therefore there is no sufficient objection even to that section.

Another objection of a constitutional character arises under article 1, section 26, which is: "Every law shall embrace but one object, which shall be expressed in the title." It is urged that this act contains both more than one object, and objects not expressed in the title. The title is, "An act for the suppression of intemperance." It would require too much space to pass in detail through the argument of the counsel in the case against Santo on this question. He carries it further than we are inclined to follow him. In the course of it he substitutes the word "subject" for "object" (between which it is apprehended that there may be a distinction), and applies both of them to each step which may be taken toward the attainment of the object of the enactment. According to this argument, the provisions for the punishment of drunkenness, prohibiting the sale, declaring certain things nuisances, the appointment of agents, etc.—each distinct idea or step—is severally a new object. We cannot concur in the objection. The act is entirely free from it. Were the argument valid, an act could hardly extend beyond one period, certainly not beyond one section. Each step toward

the main object must be provided for by a separate enactment. Half the acts in the statute-books embrace several ideas or steps in the progress of their provisions toward the attainment of the main object. The object may be a broader or narrower one, but if it be a *bona fide* object for legislative attainment, and the several steps embraced in it are fairly conducive to that end or object, it is still a unit. Under what other view could a school or revenue act be framed or upheld? Does not each of these present a unity of object? Must they be divided into as many separate acts as there are provisions to carry out the main end? Such is not the design of the constitution. This act presents a fair unity of object. See the case of *State ex rel. Weir v. County Judge of Davis County*, 2 Iowa, 280. The next class of objections presented arises from the following provisions of the constitution:

That all men have the right of acquiring and protecting property: Art. 1, sec. 1.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the papers and things to be seized: Sec. 8.

That in all criminal prosecutions the accused shall have a right to be informed of the accusation against him, and to be confronted with the witnesses against him: Sec. 10.

Private property shall not be taken for public use without just compensation: Sec. 18.

That no law of a public nature shall take effect until the same shall be published and circulated in the several counties, by authority: Art. 3, sec. 27.

Let us keep in mind what has been before said concerning the duty of a court to sustain an act of the legislative department of the government, if it can be done consistently, and to give it such a construction as will uphold it, if this can be done fairly, rather than one which will overthrow it. We have said that we should not incline to theorize. Neither will we quote the merely theoretic writers. For a sufficient expression upon the rights of individuals, and of the state governments, reference is made to the quotations heretofore made from the opinions of the able men comprising the highest judicial tribunal in our country, and upon these we shall, for the present, rest. We will next endeavor to state, as connectedly as possible, and

to notice, the objections arising under each of the foregoing provisions of the constitution. And as there will be occasion, probably, to refer to the constitutions and laws of the United States, and of Indiana, Michigan, Wisconsin, Missouri, and Kentucky, it is here stated, once for all, to save repetition, that each of them has provisions like those above cited from that of Iowa, and either in the same terms (which is generally so), or in terms so similar that no distinction need be taken, excepting that which relates to the publication of laws.

1. It is objected that there has been no publication of this act, as is required by the constitution. This objection is not explained and applied so as to make it intelligible. Article 3, section 27, provides only that the law shall not take effect until published and circulated. It gives no detailed directions. The code, section 22, makes general provision on this subject, and directs that acts of a public nature shall take effect on the first day of July following the session; and that every such act shall be presumed to have taken effect at that time, unless the contrary appear, as provided in section 23 and 24. No facts are shown in the case to make a question. We find the act in the volume of session laws, which was published before the first day of July, 1855, and believe it took effect on that day, by virtue of the above general provisions. But here it is objected that a part of the act, that is, that part relating to the vote, is made, by the act itself, to take effect on the publication of the law in certain newspapers. We see no valid objection to this. By article 3, section 27, of the constitution, if the general assembly deem a law of immediate importance, they may provide that it take effect by publication in newspapers. And it is no uncommon thing for an act to be made to take effect in part at one time and in part at another. This is generally true of our acts incorporating towns and cities, in which there is a submission to the acceptance of the citizens.

2. We give our attention to the exceptions taken under article 1, sections 1, 8, 10, 18, above cited. They are thus enumerated: 1. No particular description of the place to be searched, or the property to be seized, is required by the act; 2. The charge is not required to be distinctly and fully made against the defendant; 3. The prosecution is a criminal one, and it is not made necessary to inform the defendant, nor need he be confronted with the witnesses; 4. It authorizes a destruction of the property without notifying the defendant; 5. It authorizes a forfeiture and destruction of private property without trial, and as

a penalty for crime which need not be proved; 6. It presumes the guilt of the accused; 7. It authorizes the abatement and destruction of property, real and personal, upon the fact of finding the liquor without other proof; 8. It gives justices of the peace jurisdiction of an unlimited amount of property.

These questions, especially, we desire to try, and to test this law by the laws here and elsewhere on other subjects.

1. As to the description in the search-warrant. The act requires the place, person, and property to be described "as particularly as may be," and the argument is raised that if the complainant describe them as particularly as he can, or as he knows how, this shall be held sufficient, however loose and indefinite it may be. This is giving a false and unnecessary sense to these words. They seem to us to convey the idea of the greatest degree of certainty. The constitutions of Missouri and Kentucky have the same language as our act, "describing the person, place, or thing as nearly as may be." Was this intended to loosen the particularity of the description required? On the contrary, it is giving additional emphasis to the word "particularly."

2. As to the manner of charging the offense. The objectors do not specify any defects. The act requires the charge to be made in like manner as is required in relation to other offenses. It gives no especial directions, but, like other laws, describes the offense, and requires an information, and this must conform to the usual rules of law.

3. On informing the defendant, and confronting him with the witnesses. It is true that the act does not require that the defendant be arrested, nor is this necessary; but it requires a notice to him, as effectual, in substance, as when he is sued for any amount of indebtedness, and on which judgment may be rendered for a thousand or ten thousand dollars; and the act requires, or rather allows, him to be confronted with the witnesses, in the same manner that other provisions of law do. There is no distinction between this act and others on these questions generally. The objections are drawn from another source, which will be noticed presently.

4. That the act authorizes the destruction of the property without notifying the defendant. This objection is not founded in fact, and if it were, it is not clear that it would be valid.

5. That the act authorizes a forfeiture and destruction of private property without trial, and as a penalty for crime which need not be proved; and,

6. It presumes the guilt of the accused.

The first clause of this objection is utterly without foundation. The act requires a trial as much, and in the same manner, as any other act does. The objection relating to the presumption of guilt arises on the seventh section of the act, which is, in substance, that "no person shall own or keep intoxicating liquor with intent to sell the same, in this state; and the proof of finding the liquor named in the possession of the accused, in any place except his private dwelling-house or its dependencies, shall be received and acted upon as presumptive evidence that such liquor was kept or held for sale, contrary to the provisions of this act." The charge that the act either presumes the guilt of the defendant, or inflicts a penalty for a crime, without proof, is not true in fact. The objection intended was, probably, that the act presumes the guilt from certain facts, or from insufficient facts. The length of this opinion already warns us that we cannot enter fully into all the questions raised and suggested, and that we must not attempt to go at large into that of the power of the legislature over the subject of evidence.

The act prohibits the sale of ardent spirits, and consequently forbids the keeping it with intent to sell; and then it makes the keeping it in certain circumstances—or, if you please, in any but certain circumstances—presumptive evidence of keeping with intent to sell. It does not forbid the use of it, nor the keeping it, but it cannot be kept free from legal suspicion unless kept in one's dwelling-house or its dependencies. The dealer in gunpowder is often restricted to one place for keeping this portion of his property, and is forbidden, perhaps, to keep it within the town in which he lives and transacts his business. The sale of spirits being prohibited, its possession is rendered a suspicious fact, unless it be so kept as to indicate an intent for private use. So the possession of more than a certain number of counterfeit coins, or bank bills, is sometimes rendered presumptive evidence of an intent to utter. Illicit goods found amongst a passenger's baggage becomes strong presumptive evidence of an intent to evade the revenue laws: 1 U. S. Stats. at Large, 662, sec. 40; and they are seized and forfeited. Goods entered under a false invoice serve the same purpose, and are forfeited: Id., sec. 66. By the revised statutes of Indiana, 2 R. S., 1852, p. 417, the knowingly retaining in possession dies, plates, etc., used in forging coin or notes, is presumptive evidence of an intent to use them. So, by the same law, keeping gaming tools is punished upon the same ground. And instances of the like

kind, from the laws of all the states, could be multiplied. We have seen that the legislative authority of the state extends to its internal commerce and police, and to the health and morals of the community; and under this, a sound discretion is the only limit which can be prescribed to laws regulating the uses or possession of suspicious, injurious, or dangerous property.

7. Of the jurisdiction conferred upon justices of the peace. The exception is a novel one. It is not that the justice has jurisdiction of offenses of too high a grade, for in this respect this act comes within the general provision of the code; but it is that, incidentally, he may obtain cognizance of property of an undefined amount. Such a criterion for the jurisdiction of a justice of the peace in criminal cases, as is intimated in this objection, is not known to the constitution or laws of this state, nor of any other of which we have any knowledge. This objection, if valid, would lie to all the laws of this and the other states relating to the seizure of gaming-tables and implements, of instruments and tools for counterfeiting, of obscene books and prints, etc.

We have thus adverted briefly to all the several legal matters embraced in the exceptions taken to this act, and coming within the range of constitutional provision. But it is felt that this range of quotations is not entirely complete and satisfactory, being limited to the objections actually assigned in the cases. And as there are three cases before the court, and the arguments in some of them go beyond the errors assigned in their bearing and spirit and aim to cover broader ground, we will not feel ourselves rigidly confined.

The objection is not that the power of search and seizure given by this act is unreasonable, within the meaning of the constitution. The term "unreasonable," in the constitutions of the states, has allusion to what had been practiced before our revolution, and especially to general search-warrants, in which the person, place, or thing was not described. It is believed that no search-warrant is unreasonable, in the legal sense, when it is for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause. The laws of the United States in relation to commerce go far beyond this act: 1 Stats. at Large, 662. The officer is not required, generally, to have a warrant. A passenger's baggage is searched and illicit goods are seized and forfeited: Sec. 46. Goods removed from a wharf, etc., before they are weighed, gauged, measured, or whatever, are forfeited, and may be seized: Sec. 51. Collectors, naval officers, etc., may board vessels

within four leagues of the coast and search them in "every part:" Secs. 54, 99. Goods entered with a fraudulent invoice are forfeited, and if the collector suspect it, he may seize them: Sec. 66. The laws of the states generally—concerning the search of gaming-houses and the seizure of persons and implements; for the search and seizure of base coin and counterfeiting tools, devices, and implements; of lotteries and tickets, and of obscene books, prints, and pictures—stand upon the same ground, and have no more legal virtue than the warrant, search, and seizure required or permitted by this act; and if this must fall, by reason of any objection here urged, they must fall with it, so far as the principle is concerned. These have never been objected to on constitutional grounds, although they have existed from the beginning of these governments. The supposed doubt has arisen only on the present subject.

The same remarks extend to the objections based on the constitutional provisions concerning the right to acquire and protect property, and the other objections based on the idea of interference with private right and on the destruction of property. All the laws above referred to require the destruction of various kinds of property; they interfere with the individual's notions of the pursuit of happiness, with his supposed private rights, and his property. The legislative power is the supreme judge and guardian of the public health, safety, happiness, and morals; and if the traffic in certain property is held detrimental or dangerous to these, it may be prohibited, and such property illicitly held, kept, or used may be declared forfeited, and being forfeited, may be destroyed; and this is not taking private property for public use, in any sense which any one attaches to the constitution.

There is one other manner of viewing this act which may afford some satisfaction. It cannot but be observed, by one who compares, that the most of the objections presented against the Iowa act are, or seem to be, drawn from objections made to the Massachusetts act, in the cases of *Fisher v. McGirr*, *Commonwealth v. Albro*, and *Herrick v. Smith*, 1 Gray, 1 [61 Am. Dec. 381]. And for this reason it is, perhaps, that some of them are not more pertinent. On account of the general similarity of that act to ours, and of the important bearing which the rulings of that court, in those cases, have, or seem to have, on the questions here made, it will be useful to compare that act, and the points decided upon it, with our own law. This will be done as briefly as possible.

1. The court, in those cases, says: "It is nowhere provided, in direct terms, that keeping or having liquor deposited for sale shall be in itself unlawful and render the property liable to confiscation, or subject the owner, agent, or other depositary to a penalty therefor." This position of the court, or this fact in relation to the act, has an important effect in the reasoning and views of the court, which is traceable throughout the opinion. The Iowa act, section 7, provides that "no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquor with intent to sell the same in this state, or to permit the same to be sold therein, in violation of the provisions of this act;" and for the first offense he is to pay a fine of twenty dollars; for the second, fifty; and for the third, etc., one hundred dollars, and to be imprisoned. We start, then, clear of the effect of this objection on the act of the Iowa legislature.

2. The Massachusetts act did not limit the officer's authority for seizing to any liquors described by quantity, quality, or mark, nor to those intended for sale, but he was to seize any found in the place described. This objection is obviated by our act. It required the liquors to be "described as particular as may be," both in the complaint and warrant; and the officer is to be commanded to seize "the said liquor."

3. The other objections to the Massachusetts act will be coupled together. It provides for the destruction of the property and the punishment of the owner without his being duly charged or summoned, without giving him a day in court, without providing for a trial or for legal proof, and without giving him an opportunity to defend and to meet the witnesses face to face. No one of these objections lies to the Iowa act. By this, if the proceeding is *in personam*, the party will be arrested and proceeded with in the same manner as he would be for any other offense cognizable by a justice of the peace. If the proceeding is *in rem*, the party is to be notified by a notice equal to that upon which a judgment for debt may be recovered against him. In relation to this objection, it is worthy of remark that when goods are seized and libeled under the United States revenue laws, for a violation of them, it is not provided that the owner should be known, or named, or notified. Notice of the proceeding is given by advertisement and posting only, and the owner may appear and claim the property in the goods, and be let in to a defense by giving bonds to defend and pay the costs: Act of March 2, 1799, sec. 89; 1 Stats. at Large, 662 et

seq. And as much as has been said in these cases in relation to the presumption raised by the statute from certain facts, let us observe a provision in section 71 of the foregoing act of congress. It is this: "In actions, suits, or informations to be brought when any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the *onus probandi* shall be on the claimant," when probable cause has been shown in a complaint. This goes far beyond the act before us, and yet that law was made in a day when questions of personal right were tender ones. And the provisions of the constitution of the United States are, in these respects, like those of the constitution of this state, as well as of that of Massachusetts and other states. These laws of the United States have stood nearly sixty years; why have they not been overthrown?

The chapter of the code relating to the sale of intoxicating liquors has never been questioned in these respects, and yet in some of them it is perhaps equally liable to objection with either the Massachusetts or the recent Iowa act. By this latter, a day for trial is to be appointed, not less than five nor more than fifteen days after giving the notices; the complainants or other witnesses are to be summoned, and the trial is to proceed like other trials. It is true that all of the *minutiae* of the proceedings are not detailed; nor are they generally, by the laws of this state, or of any state where a new offense is created and made punishable. They are left to come under the general provisions of law in relation to such matters, and a detail of them is not necessary in every instance. They apply to all cases.

Whilst these Massachusetts cases have been relied upon as strong, perhaps conclusive, authority against the Iowa act, it is singularly true that the Iowa act has especially and carefully guarded every one of those points on which the supreme court of Massachusetts decided against the validity of their act. So true is this, that the mind is led to the conclusion that the draughtsman of our act was acquainted with the other, and sought to avoid its difficulties. And it affords us great satisfaction that in following our legal convictions in regard to the law of Iowa we are not opposing any doctrine advanced by that able bench. We conclude, then, that none of the objections made to this law on constitutional grounds are valid, and there remains nothing for us to do but to examine the objections to the proceedings in the particular cases.

In the case of *Santo v. State*, in a motion to dismiss the

prosecution, seventeen reasons of a constitutional nature are assigned. These are much divided and attenuated, so that it is difficult to take them up *seriatim*, but it is believed that the substantial thoughts involved in them are embraced in the foregoing remarks. The other objections to the proceedings, contained in the assignment of errors, will be briefly noticed. The first error assigned is in overruling the motion to dismiss the proceedings. This is understood to refer to the motion before the mayor, which contains the above seventeen reasons. Those of a different nature are the following:

1. That the mayor of the city of Keokuk had no legal authority to entertain the cause. The charter of that city, approved December 13, 1848, section 28, and an act in amendment thereof, approved January 22, 1853, sections 12 and 13, are very distinct in conferring upon the mayor the jurisdiction of a justice of the peace, under the criminal laws of the state, and make him a justice in substance, although they do not call him such in terms, as do the charters of some other towns. Should there be any constitutional objection to the above section in the amendatory act, it is not necessary to consider it now, as the original charter gives all the authority here required. The objection intended is that the mayor is an executive officer, and that judicial authority is conferred upon him, in conflict with that provision of the constitution which says that no person charged with the exercise of powers properly belonging to one of these departments—the executive, the legislative, or the judicial—shall exercise any function appertaining to either of the others. These "departments," are the departments of the government of the state of Iowa. The mayor of the city of Keokuk is not a part of the government of Iowa. He exercises none of the functions belonging to that department. Whatever executive offices he may perform pertain to him only as an officer of that corporation. But we do not mean to say that he is an executive officer in any proper sense. Similar provisions exist in the constitutions of all, or nearly all, the other states, and yet from time immemorial similar powers have been conferred upon the mayors of cities. We are of opinion that the objection is not well taken.

2. The want of the mayor's seal on the warrant. The seal of the town is a "corporate seal" (see charter, section 1), and is not known to the general law of the land. It is not his seal as a justice of the peace under the state law, and his court is not a court of record.

3. It is objected that Mark P. Landon was a constable of Keokuk, and that the same person is one of the complainants. The code, section 175, provides that "no sheriff, deputy sheriff, coroner, or constable shall appear in any court as attorney or counsel for any party, nor make any writing or process to commence [a suit or a proceeding], or to be in any manner used in the same; and such writing or process made by any of them shall be rejected." It is quite unnecessary to extend the construction of this section so far as to prohibit peace-officers from making complaint of the violation of the penal laws. This would be without the letter, and against the spirit, of the section, and destructive of half the object and utility of those officers.

The fourth objection is, that the information and warrant are void, inasmuch as neither the place to be searched nor the intoxicating liquors to be searched for and seized are not particularly described. This objection was not made before the mayor, and is not included in the supposed affidavit of causes for appeal, but appears to have been first made in the district court. The defendants having appeared before the mayor and had a trial without making this question, and it not being assigned as an error in the affidavit, it is not now open to inquiry.

The second error assigned to the proceedings of the district court is the refusing the defendants a jury trial. The constitution, article 1, section 9, says: "The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts." Our law gives a jury of six in trials before a justice of the peace. Sections 3358 and 3361 of the code have been so construed as to leave in the district court an authority to inquire into the appeal so far as to determine whether a new trial should take place, and to grant or refuse it: See *Baurose v. State*, 1 Iowa, 874. The section (3361) is ambiguous and difficult of interpretation, and that given it may not be entirely satisfactory. In exercising this authority, then, the court did not err, and whether it exercised it properly or not is not made to appear. It is here assumed that the general provision in the last-cited section of the code is applicable to this case, as to others, and that it is not superseded by anything in section 10 of the act in question. This is considered the true doctrine.

The next five errors assigned are: 3. In affirming the judgment of the court below; 4. In adjudging that the liquors were kept for the purpose of being sold, in violation of the law; 5.

In adjudging that the liquors were forfeited; 6. In ordering the defendants to pay the costs of appeal as well as those below; 7. In ordering that the liquors be destroyed.

There was a trial before the mayor, and a verdict rendered against the defendants by a jury; and if there was no error for which the district court should reverse the judgment of the mayor, and no ground upon which a new trial should be granted, then these things followed as legal consequences, and the court did not err therein.

The eighth error assigned is "in overruling various other motions and questions, apparent upon the record, which is made part and parcel of this assignment of errors." This is too broad. It is not the office of the court to hunt for errors. And there is so much want of congruity between the positions taken in the different stages of the case—before the mayor, in the district court, and in this court—that we may have noticed questions not really before us; but it has been our desire not to seem to avoid any question fairly presented. We are aware that some other points were started in the early stage of the case, but they have not been continued throughout the cause, and brought before us. Such is the irregular state of the papers that it is somewhat difficult to ascertain what is properly presented. It may be that there is nothing before us properly, for, to state one of the ambiguities of the case, the act, section 10, gives the defendant an appeal if he or some person for him shall make an affidavit stating the fact, showing the alleged errors in the proceedings or judgment complained of; and it is questionable whether there is such an affidavit in the case. We have, however, treated a certain paper, or certain papers, as such.

The judgment is affirmed.

WRIGHT, C. J., dissented.

CONSTITUTIONAL PROVISION THAT STATUTE SHALL EMBRACE BUT ONE SUBJECT OR OBJECT, which shall be embraced in its title: See note upon this subject, *Davis v. State*, 61 Am. Dec. 337-346. The principal case is cited upon this point in *Morford v. Unger*, 8 Iowa, 86; *Porter v. Thomson*, 22 Id. 394; *State v. Young*, 47 Ind. 169.

CONSTITUTIONALITY OF ACTS SUBMITTING TO VOTE OF PEOPLE whether they shall take effect or not: See *Williams v. Cannanack*, 61 Am. Dec. 508, and the citations thereof collected in the note; *Parker v. Commonwealth*, 47 Id. 480; *Barto v. Himrod*, 59 Id. 506, and note. Amendments to municipal charters may be submitted to vote of people: See note to *Commonwealth v. Cullen*, 53 Id. 472. So the option to adopt liquor ordinance may be submitted to a town: *Goddard v. President etc. of Jacksonville*, 60 Id. 773, and note 780; see also *Louisville etc. R. R. Co. v. County Court of Davidson*, 62 Id. 424. The

principal case is cited to the point that the legislature cannot submit to the people whether or not an act shall become a law, except in the case of acts affecting corporations, private or municipal: *Geebrick v. State*, 5 Iowa, 493, 496; *Morford v. Unger*, 8 Id. 87, 88; *State v. Beneke*, 9 Id. 205; *State v. Weir*, 33 Id. 185; *Wier v. Cram*, 37 Id. 652; *Ex parte Wall*, 48 Cal. 313; and in *Dalby v. Wolf*, 14 Iowa, 230; but it was held in the last case that an act authorizing the people of the several counties of the state to decide by a majority vote to restrain swine and sheep from running at large was not unconstitutional for this reason, for the law went into effect without the vote of the people, which did not determine the existence of the act as a law, but only whether a certain thing should be done under it.

PART OF STATUTE MAY BE DECLARED VOID AND RESIDUE VALID: *Fisher v. McGirr*, 61 Am. Dec. 381, and note 410. The principal case is cited to the point that a statute void in part is not necessarily void wholly, though where the act is so framed that a part cannot be declared void and the rest permitted to stand, then the whole act must be declared void: *Geebrick v. State*, 5 Iowa, 498; *Morford v. Unger*, 8 Id. 88; *Keokuk v. Keokuk etc. Packets Co.*, 45 Id. 211; *Robinson v. Bidwell*, 22 Cal. 386, 392.

JUDICIARY MAY DECLARE STATUTES UNCONSTITUTIONAL, BUT STATUTES SHOULD BE UPHELD as valid if possible, and not be declared unconstitutional except where their invalidity is certain, clear, decisive, and unavoidable: *Boston v. Cummins*, 60 Am. Dec. 717; *Sharpless v. Mayor of Philadelphia*, 59 Id. 759; *Winter v. Jones*, 54 Id. 379; *Lycoming v. Union*, 53 Id. 575; and see *Fisher v. McGirr*, 61 Id. 381. The principal case is cited to this effect in *McMillen v. Boyles*, 6 Iowa, 314; *McCormick v. Rusch*, 15 Id. 139; *Stewart v. Board of Supervisors*, 30 Id. 14; *Dubuque v. Illinois Central R. R. Co.*, 39 Id. 100; *Pleuler v. State*, 11 Neb. 555; *S. & V. R. R. Co. v. City of Stockton*, 41 Cal. 169; *Bourland v. Hildreth*, 26 Id. 229.

POWER OF STATE TO REGULATE SALE OF SPIRITUOUS LIQUORS: See *Fisher v. McGirr*, 61 Am. Dec. 381; *Goddard v. President etc. of Jacksonville*, 60 Id. 773; *Commonwealth v. Kimball*, 35 Id. 328, and extensive note 381 et seq.; see also *Begley v. State*, 58 Id. 628, and note 630; *State v. Gurney*, Id. 782; *Stevens v. State*, 35 Id. 72; *Mayor etc. of Mobile v. Yeuille*, 36 Id. 441; *Preston v. Drew*, 54 Id. 639; *Adams v. Hackett*, 59 Id. 376. The principal case is cited to the point that the right of the legislature to pass laws prohibiting the sale of liquors, and providing for the forfeiture of liquors belonging to one who violates the law, is undoubtedly, and rests upon the police power of the state, in *Polk County v. Hierb*, 37 Iowa, 364, 365. It is affirmed upon the constitutionality of the Iowa liquor act in *Bryan v. State*, 4 Id. 352; *State v. Bartmeyer*, 31 Id. 601.

SEARCH-WARRANTS, GROUNDS FOR ISSUANCE AND CONSTRUCTION OF: See *Fisher v. McGirr*, 61 Am. Dec. 381, and cases cited in the note 409.

LIQUOR LAW IN CONFLICT WITH CONSTITUTIONAL PROVISION CONCERNING UNREASONABLE SEARCHES and seizures is invalid: See *Fisher v. McGirr*, 61 Am. Dec. 381.

LIQUOR LAW IS UNCONSTITUTIONAL WHICH THROWS BURDEN OF PROOF UPON OWNER OF LIQUORS, and authorizes forfeiture in absence of any evidence against him or the property; or which does not provide for the framing of an issue upon the question and a trial in due course of law: *Fisher v. McGirr*, 61 Am. Dec. 381.

ONE DEPARTMENT OF GOVERNMENT NOT TO ENCROACH UPON FUNCTIONS OF ANOTHER: *Wright v. Wright's Lessee*, 58 Am. Dec. 723; *Dennett, Petitioner*,

54 Id. 602; *De Chastellux v. Fairchild*, 53 Id. 570, and cases cited in the notes. The principal case is cited to the point that the constitutional provision against one department of the government encroaching upon the functions and duties of any other department refers only to the several departments of the state government, and not to the local governments. And it was held that the police judge of San Francisco might perform *ex officio* the duties of the office of police commissioner of that city in *People v. Provinces*, 34 Cal. 538. To the same effect in *Uridias v. Morrill*, 22 Id. 478.

QUESTION WILL NOT BE CONSIDERED ON APPEAL WHEN NOT RAISED IN COURT BELOW: *Amidown v. Oegood*, 58 Am. Dec. 171; *Elliott v. Rhett*, 57 Id. 750; *State v. Godwin*, 44 Id. 42. The principal case is cited to the point that defects in the complaint or proceedings will not be noticed on appeal unless the objection was presented in the lower court and is contained among the errors assigned: *State v. Nichols*, 5 Iowa, 414. And see, upon this point, *Martin v. Webb*, 39 Am. Dec. 363; *Agnew v. McElroy*, 48 Id. 772.

PARTY COMPLAINING OF ERROR MUST AFFIRMATIVELY SHOW IT: *Donnell v. Jones*, 52 Am. Dec. 194; *Barber v. Hall*, 60 Id. 301, and notes. Error not apparent in the record will not be taken notice of unless excepted to: *Gant v. Hensucker*, 55 Id. 408; *State v. Morgan*, 47 Id. 329; where a bill of exceptions is too indefinite, the court will not presume error: *State v. Goodrich*, 47 Id. 676. See also note to *Johnson v. Jennings*, 60 Id. 330. The principal case is cited to the point that an assignment of error too general or indefinite in its character will not be considered in the appellate court: *Sherwood v. Snow*, 46 Iowa, 483.

NECESSITY OF SEAL TO VALIDITY OF PROCESS: See *State v. Drake*, 58 Am. Dec. 757; *State v. McNally*, 56 Id. 650; *Garland v. Britton*, 52 Id. 487, and cases cited in the notes.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

JONES v. EVERMAN.

[15 B. MONROE, 631.]

NOTE EXECUTED TO ONE AS ADMINISTRATOR IS PRIMA FACIE ASSETS of the estate.

ADMINISTRATOR'S INDIVIDUAL DEBT IS NOT PRESUMED ADJUSTED ON EXECUTION OF NOTE TO HIM as administrator by his creditor.

ADMINISTRATRIX MAY MAKE NOTE HER OWN, GIVEN TO HER AS ADMINISTRATRIX, and is presumed to have done so where she sues on it, with her husband, in her own right.

ANTENATAL PERSONAL DEBT OF ADMINISTRATRIX IS ADMISSIBLE SET-OFF in an action by her, in conjunction with her husband, in her personal right, on a note given to her as administratrix, and its effect can be avoided only by allegation and proof that the note is still assets of the estate.

APPEAL from Montgomery circuit. The facts appear from the opinion.

K. and S. F. Farrow, for the appellant.

Haslerigg and Peters, for the appellee.

By Court, Simpson, J. This action was brought by Everman and wife against Jones, on a note which he had executed to the wife as the administratrix of William Wren, deceased, before her marriage with the plaintiff Everman.

The defendant set up and relied upon, by way of set-off, an account against the wife for board and maintenance furnished her prior to her marriage.

Upon the trial, the court instructed the jury that "the note sued on was *prima facie* evidence that the defendant's account had been settled up to the date of the note, and the burden of proof to show that it was not was upon the defendant."

This instruction we deem erroneous. The execution of a note to a person, as administratrix or administrator, is *prima facie* evidence that the assets of the intestate constitutes its consideration: *Williams v. Collins*, 1 B. Mon. 61. In the execution of such a note, the obligor has no right to demand a settlement of the individual liabilities of the administrator. Such a right might conflict with the proper discharge of his duties, by preventing a legal administration of the assets. As the payor of the note has no right to demand an abatement of its amount, at the time of its execution, on account of any debt which the administrator in his individual capacity may owe him, it follows as a necessary consequence that no presumption can arise that any such claims had been then settled by the parties.

But although a note executed to an administratrix, as such, must be regarded *prima facie* as assets of the intestate, yet as the administratrix may have made it her own property by charging herself or being charged in a settlement with the amount of it, and as she has elected, in conjunction with her husband, to sue on it in her own personal right, and thereby treat it as her own, the defendant might rely upon the individual account of the wife as a set-off; the effect of which defense could only be avoided by allegation and proof on the part of the plaintiff that the note sued on still continued to be legal assets.

The other instructions given to the jury are unobjectionable; but for the error indicated the judgment must be reversed.

Wherefore the judgment is reversed, and cause remanded for a new trial in conformity with this opinion.

NOTE EXECUTED TO ONE AS ADMINISTRATOR, how regarded, and who may sue on: See *Sanders v. Blaine's Adm'r*, 22 Am. Dec. 86; *Sheets v. Pabody*, 28 Id. 132.

ANTENUPTIAL DEBTS OF WIFE, liability for, in general: See *Cole v. Secley*, 60 Am. Dec. 258, and note thereto.

**WIGHT v. SHELBY RAILROAD Co. ALLEN v.
SHELBY RAILROAD Co.**

[16 B. Monson, 4.]

To CONSTITUTE WRITING ESCROW merely, it must be placed in the hands of a third person, to be delivered on the happening of a specified contingency.

STOCK SUBSCRIPTION CANNOT BE DELIVERED AS ESCROW TO COMMISSIONERS appointed to receive subscriptions, to take effect only on a specified condition, but the subscription is absolute, and the non-performance of the condition is no defense.

PAROL EVIDENCE TO VARY STOCK SUBSCRIPTION OR SHOW IT CONDITIONAL, when it is not so on its face, is inadmissible.

PROVISIONS OF CORPORATE CHARTER ARE PRESUMED KNOWN TO SUBSCRIBERS to the stock of the corporation.

REPRESENTATIONS TO SUBSCRIBERS TO STOCK IN RAILROAD COMPANY, by the commissioners appointed to receive stock subscriptions, as to the future location of the road, where the commissioners, by the terms of the charter, have nothing to do with the location, cannot render the subscriptions invalid, where it is not shown that the subscribers were ignorant of the terms of the charter, or that they were deceived or misled by the commissioners.

WHETHER CORPORATION WAS PROPERLY ORGANIZED UNDER CHARTER cannot be determined collaterally in an action on a subscription to stock in the corporation, but only by a direct proceeding.

SUBSCRIBER TO CORPORATE STOCK CANNOT INVALIDATE SUBSCRIPTION by alleging non-receipt of the stock by the commissioners, where the corporation recognises his stock as valid.

NON-PAYMENT BY SUBSCRIBER TO CORPORATE STOCK OF SUM REQUIRED by law to be paid on each share at the time of the subscription does not release him from liability for his subscription, and is no defense to an action thereon.

ERROR to Shelby circuit. The opinion states the case.

T. W. Brown and W. D. Reed, for the appellants.

Throop, Bullock, and Lindsey, for the appellees.

By Court, SIMPSON, J. As the same questions are involved in both of these cases, and as the validity of the defense presented in both has to be examined in each case, we will proceed to consider and decide such questions as arise upon the record in either case.

The defense relied upon by Wight, that the subscription of stock made by him was left with one of the commissioners in the nature of an escrow, is wholly invalid. The commissioners were the persons appointed by the charter to receive and accept subscriptions of stock. A subscription received by them, even if such a writing could under any circumstances be made to assume the nature and attributes of an escrow, could not take that character, inasmuch as when it was received by them it became just as obligatory on the party making it as a promissory note would be upon the maker who left it with the payee or his agent. The well-settled doctrine is, that to make a writing an escrow merely, it must be placed in the hands of a third person by the party making it, to be delivered to the other party on the happening of a specified contingency. Here the subscribers were the parties on one side, and the commissioners on the other. A subscription, when made and received by the com-

missioners, could not therefore be a mere escrow, but became in law an absolute undertaking for the payment of the stock subscribed according to the provisions of the charter.

So far as the defendants or either of them alleged that their subscription was conditional, and was not to be obligatory upon them unless the road was located on a certain route, it is only necessary to remark that, the contract being in writing, parol proof is inadmissible to alter its terms, or to show that instead of being absolute, as it purports to be, it was in reality conditional. The subscribers might have annexed a condition to the terms of their subscriptions if they had thought proper to do so, and it would then have been with the commissioners to determine whether such conditional subscriptions of stock would be received; but not having done so, they cannot, according to the well-established doctrine on the subject, allege or prove that the contract was different from that which is evidenced by the writing, unless they can establish fraud or mistake in its execution.

If any representations made by the commissioners in reference to the locality of the road could have the effect to render the subscriptions invalid, which we do not deem it necessary to decide, we are satisfied that no such state of case is presented in any of the answers as would authorize such a result. The duties and powers of the commissioners were prescribed by the charter. They had no power to locate the road, but its location depended upon the will of the president and directors when the company was organized. The subscribers must be presumed to have known the provisions of the charter, and knowing them, they could not have been deceived or misled by any representations made to them on this subject by the commissioners. They do not allege that they were ignorant of the provisions of the charter, or even that they believed that the commissioners had power to locate the road, or that the commissioners represented to them that they had any such power, so that they fail to show that they could have been deceived or misled, with respect to this matter, by the commissioners. If they knew upon whom the power to locate the road devolved under the charter—and they must, as before remarked, be presumed to have known it, especially as they have not denied that they had such knowledge—they must have regarded any statements or representations made by the commissioners on the subject as a mere expression of their opinion about the matter, entitled to the same weight, and no more, that the opinion of any other individual was entitled to, and they could not have been deceived or imposed

upon by it. Indeed, they nowhere allege that they relied upon the representations made to them by the commissioners, believing that they knew where the road would be located, or had any power whatever over its location. And as the act of incorporation is referred to in the subscription itself, and made a part thereof, it may well be doubted whether the subscribers would be permitted to deny a knowledge of its contents.

Whether the company was properly organized or not, according to its charter, is a question that cannot be made collaterally, but can only be made by a direct proceeding against the corporation: *Hughes v. Bank of Somerset*, 5 Litt. 45; *Tyler v. Nelson*, 9 B. Mon. 71.

As the stock subscribed by the defendant Allen is recognized by the plaintiffs as valid stock, and sued for as such, he has all the rights and privileges of a stockholder, and cannot invalidate his subscription by alleging that the stock had never been received by the commissioners, inasmuch as that allegation is contradicted and disproved by the record.

The failure to pay the sum of one dollar on each share of stock subscribed cannot certainly be relied upon by the subscribers as exonerating them from their liability for their subscriptions. It was their duty to pay it at the time the stock was subscribed, but they should not be allowed to take advantage of their own wrong, and release themselves from their whole obligation by a failure to perform a part of it. Even if the commissioners might have refused to receive the stock unless the payment had been made, yet, as they did not do it, the contract was, after the stock had been received without the payment, binding upon both sides.

The decision of the court in the case of *Union Turnpike v. Jenkins*, 1 Cai. 381, sustains the views expressed in this opinion, and it is only the opinion of the dissenting judge that is cited in *Angell & Ames on Corporations*, and referred to by the counsel for the appellants. The decisions of the Massachusetts courts, on some of the questions involved in these cases, have not been followed by this court.

In our opinion, none of the defenses presented by either of the appellants was a sufficient answer to the plaintiff's action.

Wherefore the judgment in both cases is affirmed.

ESCROW, DELIVERY OF DEED OR OTHER WRITING AS, GENERALLY: See *Foley v. Cowgill*, 32 Am. Dec. 49; *Gilbert v. North American F. Ins. Co.*, 35 Id. 548, and note; *Hicks v. Goode*, 37 Id. 677; *Perry v. Patterson*, 42 Id. 424, and note; *Shirley v. Ayres*, 45 Id. 546, and note; *Blight v. Schenck*, 51 Id. 478;

Worrall v. Munn, 55 Id. 330, and note. As to whether or not a deed or other writing can be delivered in escrow to the obligee or party entitled, see the note to *Worrall v. Munn*, *supra*, and cases referred to therein. Instrument cannot be delivered to obligee, payee, or agent as escrow: See *Madison etc. Co. v. Stevens*, 10 Ind. 2; *Deardorff v. Foresman*, 24 Id. 485, both citing the principal case. Parol evidence attaching condition to delivery of mortgage, that road should be constructed over certain route, is inadmissible: See *Callanen v. Judd*, 23 Wis. 353, citing the principal case.

CONDITIONAL SUBSCRIPTION TO STOCK OF CORPORATION: See *McMillan v. Maysville etc. R. R. Co.*, 61 Am. Dec. 181. See also the note to *Franklin Glass Co. v. Alexander*, 9 Id. 101.

SUBSCRIPTION FOR STOCK, WHEN BINDING, GENERALLY, and liability of stockholder thereon: See the note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 96, where this subject is discussed. See also *Selma etc. R. R. Co. v. Tipton*, 39 Id. 344; *Muskingum etc. Co. v. Ward*, 42 Id. 191; *Payne v. Bullard*, 55 Id. 74; *Connecticut etc. R. R. Co. v. Bailey*, 58 Id. 181; *Strasburg R. R. Co. v. Echternacht*, 60 Id. 49; *McMillan v. Maysville etc. R. R. Co.*, 61 Id. 181, and cases cited in the notes thereto.

PAROL EVIDENCE TO VARY STOCK SUBSCRIPTION: See *Connecticut etc. R. R. Co. v. Bailey*, 58 Am. Dec. 181, and note.

FRAUD OR MISREPRESENTATION AS DEFENSE TO ACTION ON STOCK SUBSCRIPTION: See the note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 101 et seq. Good faith to creditors or other subscribers requires a subscriber to contribute to a fund for payment of debts: See *Illinois R. R. Co. v. Zimmer*, 20 Ill. 657, citing the principal case.

INADEQUACY OF ORGANIZATION OR FORFEITURE OF CHARTER AS DEFENSE AGAINST STOCK SUBSCRIPTION: See the note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 101. See also *Crocker v. Crane*, 34 Id. 228; *Connecticut etc. R. R. Co. v. Bailey*, 58 Id. 181. Validity of charter or of corporate existence is determinable by direct proceeding only, and not collaterally: *Dean v. Davis*, 51 Cal. 412, citing the principal case. Extracts from records of directors of corporation are admissible to prove its proper organization: *Breedlove v. Martinsville etc. R. R. Co.*, 12 Ind. 115, citing the principal case.

STOCKHOLDER'S RIGHT TO AVAIL HIMSELF OF NON-PAYMENT OF SUM REQUIRED TO BE PAID on his stock at the time of subscription in a subsequent action on such subscription: See the note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 101. See also the note to *Hibernia T. Corp. v. Henderson*, 11 Id. 609, where this subject is particularly discussed.

RUSSELL v. BALLARD.

[16 B. MONROE, 201.]

SURETY ON NOTE IS EXONERATED BY ITS DELIVERY, WITHOUT HIS ASSENT, by principal in payment of an antecedent debt to another, where it shows on its face the fact of suretyship, and that it was made payable to a particular bank.

APPEAL from Jefferson circuit. The case appears from the opinion.

J. Harlan, for the appellant.

Logan and Bland Ballard, for the appellee.

By Court, Simpson, J. The appellant brought an action on a note executed by the defendants, which reads as follows, viz.: “\$155.

LOUISVILLE, Ky., May 12, 1853.

“One hundred and sixteen days after date, we, James D. Hamilton, as principal, and A. J. Ballard, as sureties, promise to pay jointly and severally, to the order of the Mechanics’ Bank, one hundred and fifty-five dollars, negotiable and payable at said bank in Louisville, without defalcation, for value received. Witness our hands.

“JAMES D. HAMILTON
“A. J. BALLARD.”

He alleged in his petition that said note was made solely for the purpose of raising money to pay a debt which he held on the defendant Hamilton, and that the latter, being unable to have it discounted in bank, transferred and delivered it to him in liquidation and discharge of the debt he owed him.

The defendant Ballard denied in his answer that said note was made for the purpose alleged by the plaintiff, and stated expressly that he would not have signed it if he had known it would have been so applied. He also alleged that he executed it as the surety of his co-defendant, for the sole purpose of raising money for the use of the family of the latter, by borrowing it from the bank; that he would not have executed it for any other purpose, and that his co-defendant had no authority from him to use the note in any other manner whatever. The bank, he alleged, had never discounted or owned the note, but it had been passed by his co-defendant directly to the plaintiff, in payment of a pre-existing debt, in open violation of the understanding between him and his co-defendant at the time it was executed, and in utter subversion of the object for which it was created.

A demurrer to this answer was overruled, and the allegations therein being sustained by the testimony, the court, to whom the law and facts of the case were submitted by the parties, rendered a judgment in favor of the defendant Ballard, and gave the plaintiff a judgment against the other defendant.

It is contended on the part of the appellant that according to the case of *Ward v. Northern Bank of Kentucky*, 14 B. Mon. 283, and the principles therein settled, the defense of Ballard was insufficient, and the judgment exonerating him from liability on the note is erroneous.

On the other side, the case referred to has been assailed as containing unsound doctrine, and it is also contended that, conceding it to be authoritative, it is not analogous to the present case.

The doctrine contained in that case is, that when a note is made to raise money upon it, and it is executed by certain persons as sureties to impart credit to it, and left by them in the possession of their principal, who uses it for the very purpose for which it was made, the sureties cannot escape responsibility on it, upon the ground that it was made payable to a bank, and the money was advanced on it, not by the bank, but by another person. The decision in that case was made to turn upon the fact that the object for which the paper was executed, to wit, to raise money upon it, had been accomplished, and the circumstance of it having been made payable to the bank was deemed insufficient to exonerate the sureties.

There is a clear and marked distinction between that case and this. Here the intention with which the paper was created, instead of being carried into effect, was in reality defeated. The very fact upon which that case turned is wanting in this. No money was raised upon this note, but it was passed off in payment of a pre-existing debt. In that case the act of the surety had enabled the principal to obtain the money from a third person, and the question who should sustain the loss was, at least in a moral point of view, clearly against them. But here the plaintiff has not been induced by the act of the surety to part with his money or his property. He does not sustain any loss by the discharge of the surety from liability on the note, but he is thereby only placed in his original position, and the principal in the note still remains his debtor, and liable for the amount of the debt.

The form of the note in this case indicated the purpose for which it was executed. It was made payable to a bank, and showed on its face that Ballard was only the surety of his co-obligor.

These circumstances were sufficient notice to the plaintiff that the paper was intended to be used to raise money upon it. They were sufficient, at least, to have put him upon an inquiry as to the object of the surety in its execution. By such an inquiry he could have ascertained that the intention of the makers of the note was truly indicated on its face. Any supposition or inference that Ballard intended, by executing the note, to become a surety for the payment of his debt, instead of being authorized, was in fact repelled by the form of the writing.

If a note be purchased by a party, with notice that one of the obligors is a surety merely, and that the sale and purchase will defeat the purpose for which it was executed by him, or will violate any understanding or agreement between him and his principal, then the purchaser will be affected by such notice, and cannot hold the surety liable on the note, or compel him to pay it.

The plaintiff must be considered as having notice at the time the note was transferred and delivered to him by Hamilton that it was signed by his surety that money might be raised upon it by his principal, and that by its transfer to him it was diverted from the purpose for which it was made, and the understanding of the parties to it was thereby set at naught and wholly disregarded. Consequently he cannot hold the surety responsible upon the writing.

Wherefore the judgment is affirmed.

WHETHER SURETY DISCHARGED BY DELIVERY OF NOTE IN VIOLATION OF UNDERSTANDING between himself and principal: See *Smith v. Moberly*, 52 Am. Dec. 543, and note.

BURNHAM v. CORNWELL.

[16 B. MONROE, 284.]

MUTUAL PROMISES TO MARRY ARE ESSENTIAL to sustain an action for breach of promise of marriage.

PLAINTIFF'S DECLARATION OF WILLINGNESS TO MARRY DEFENDANT, IN BREACH OF PROMISE suit, made to a third person in the defendant's absence, is not evidence to prove a promise by the defendant.

DIRECT EVIDENCE OF EXPRESS PROMISE TO MARRY IS UNNECESSARY in a suit for breach of such promise, but it may be proved by the unequivocal conduct of the parties, and by a general yet definite understanding between them and their relatives, corroborated by their actions.

EVIDENCE OF COURTSHIP BY DEFENDANT IN BREACH OF PROMISE SUIT, that is, of a course of particular attentions and visits to plaintiff, is not sufficient to show a promise of marriage, but the circumstances must be such as to show that there was a serious promise and acceptance.

EXPRESSION TO THIRD PERSON OF INTENTION TO MARRY is not a promise to marry, though, with other facts, it may be evidence of a promise.

OFFER OF PERFORMANCE OF PROMISE TO MARRY BY PLAINTIFF must be shown to sustain an action for breach of a promise to marry, generally, or in a reasonable time.

PROMISE OF MARRIAGE WITHIN YEAR BEFORE SUIT CANNOT BE INFERRRED FROM ATTENTIONS, such as are usually paid by gentlemen offering matrimony to ladies, continued to within one year.

APPEAL from Marshall circuit. The case is stated in the opinion.

M. Mayes, for the appellant.

No brief for the appellee.

By Court, MARSHALL, C. J. Caroline Cornwell, a widow, brought this action for an alleged breach of promise of marriage, and obtained a verdict and judgment against William Burnham for five hundred dollars, and his motion for a new trial having been overruled, he brings the judgment to this court for revision.

There was no direct evidence of an engagement, or of mutual promise between the parties to marry each other, nor of a promise by the defendant to marry the plaintiff, nor of any offer on the part of the plaintiff to marry the defendant, nor of any request by her that he should marry her. There being no evidence of any engagement or promise to marry, there was of course no evidence of there being any time or place fixed on between them for the marriage to take place; and although it be proved that the plaintiff was ready and willing to marry the defendant, this imposed on him no legal obligation to marry her, nor any liability for not marrying her. Even if it appeared that her inclination to marry him was induced by his attentions to her, there must still be a promise to marry on his part to entitle her to recover damages for his failure, however reprehensible, to meet her just expectations founded upon his own conduct. Nor is it sufficient that there should be a promise on the part of the male; there must be mutual promises; that is, a mutual engagement to marry. Where the promise or offer of the male has been proved, it has been held that the mutuality of the promise or engagement may be proved by showing that the female demeaned herself as if she concurred in and approved of his promise or offer: Chit. Cont. 537, and the cases there cited; *Hutton v. Mausell*, 3 Salk. 16, 64; *Phillips v. Crutchley*, 3 Car. & P. 178. But without proof of an offer or promise on his part, even her declaration to a third person, in his absence, that she was willing to marry him, would be wholly incompetent to prove a promise on his part. Such evidence is not admissible to prove his promise.

It is true that to establish a promise, even on the part of the male, it is not necessary that there should be direct evidence of an express promise in *totidem verbis*: Chit. Cont. 536. The author referred to says it may be evidenced by the unequivocal conduct of the parties, and by a general, yet definite and reciprocal, understanding between them, their friends and rela-

tions, evidenced and corroborated by their actions, that a marriage was to take place.

In the case of *Wightman v. Coates*, 15 Mass. 1 [8 Am. Dec. 77], it is said by Parker, C. J., in an able and interesting opinion on the subject, that a mutual engagement "may be proved by those circumstances which usually accompany such a connection." But it is evident from the context that in making this remark he had particularly in view the proof of a promise on the part of a female, and in that case the evidence of a promise by the male was of a decisive nature. In a note to the same case, page 5, is to be found an extract from the case of *Honyman v. Campbell*, 5 Wils. & Shaw, 144; S. C., 2 Dow & C. 282, in which the question as to the proof by which a promise of this kind may be established is satisfactorily scrutinized by the lord chancellor, who, among other things, says: "If I were at *nisi prius*, trying it with a jury, I should inform them that they must be satisfied that there was a promise—a serious promise—intended as such by the person making it, and accepted as such by the person to whom it was made." And this, as it seems to us, is the only safe ground on which to place the circumstantial proof of such a promise. It is not sufficient that there has been, on the part of the male, a courtship, that is, a course of particular attentions evidencing affection; but the conduct and actions of the parties, and the attendant circumstances, must be such as to satisfy the jury that there was a serious promise or offer of marriage, accepted as such.

Mutual promises to marry may doubtless be inferred from the visits of the male to the female, and his declarations that he had promised to marry her: *Southard v. Rexford*, 6 Cow. 254. But expressions to third persons of an intention to marry another, not in the presence of the latter, do not amount to a promise to marry: *Cole v. Cottingham*, 8 Car. & P. 75, though with other circumstances they tend to prove one.

There being no proof in this case of any offer or request at any time on the part of the plaintiff to the defendant that they should be married, and none from which such offer or request could be legitimately inferred by the jury, there was a fatal defect in the plaintiff's case, even if a promise to marry, either generally or in reasonable time, or when requested, had been proved: *Fible v. Caplinger*, 13 B. Mon. 464; *Burks v. Shain*, 2 Bibb, 341 [5 Am. Dec. 616]. And the motion for a nonsuit should on that ground have prevailed. And as this proof was not afterwards supplied, there must be a reversal on that

ground. But as the case must go back for a new trial, it is necessary to notice the instructions given, or at least the principles on which they seem to be based.

The first instruction authorizes the jury to infer from the visits of the defendant to the plaintiff, and from such respects on his part as are usual in courtships or in making matrimonial engagements, a promise of marriage on his part, etc. The second authorizes them to infer that such a promise to marry was made within one year (the limitation to the action by law, and on which the defendant relied), if such attentions as are usual on the part of gentlemen offering matrimony to ladies continued up to within one year. The first instruction makes courtship alone evidence of a promise to marry, and the second is apparently based upon the first; neither of them declares either that there must have been a promise seriously made or accepted, or that the jury must be satisfied that such was the fact. The fourth instruction is based upon the hypothesis that there being a promise on the part of the defendant within a year, etc., to marry the plaintiff, which might of course be inferred as authorized by the first and second instructions, if there was also an offer on the part of the plaintiff to consummate the marriage, of which latter fact there was no evidence, they should find for the plaintiff, unless, etc. This instruction is infected with the error of the first and second, and is also erroneous in assuming that there was evidence of an offer by the plaintiff to consummate the marriage. The fourth instruction is also subject to the objection that it refers to the jury, and as a ground of enhancing the damages, the question of the defendant having, by reason of his promise to marry the plaintiff, seduced her, of which fact there is no evidence, and which, not being averred, could not be proved: *Burke v. Shain*, 2 Bibb, 343 [5 Am. Dec. 616]. The fifth and last instructions are subject to the same objections as the third and fourth, and are more objectionable than either.

Wherefore the judgment is reversed, and the cause remanded for a new trial in conformity with the principles of this opinion.

ACTION FOR BREACH OF PROMISE OF MARRIAGE.—It would seem to be scarcely necessary to say that an action for breach of a marriage contract will lie at common law. The contrary was, however, maintained by able counsel in a learned and elaborate argument in a comparatively recent Indiana case, but the court sustained the action: *Short v. Stotts*, 58 Ind. 29. There is, no doubt, something repugnant to refined sensibilities in the idea of giving a pecuniary remedy for an injury to the affections occasioned by a breach of such a contract. But the common law is too intensely practical

to take romantic views of the marriage relation, or of engagements to enter into that relation. It regards marriage as a "valuable" consideration; a thing not only possessing value, but whose value may be estimated in money. Looking at marriage engagements as in some sense business transactions, entered into with a view, in part at least, to pecuniary advantage, it does not hesitate to award relief in damages for the breach of such contracts. This idea of the pecuniary value of marriage is conspicuous in many of the cases on this subject.

VALIDITY OF MARRIAGE PROMISE AS AFFECTING ACTION FOR BREACH.—The first requirement in order to the maintenance of an action for a breach of promise of marriage is a valid promise.

1. *Validity of Promise, by What Law Governed.*—No doubt, as a general rule, the validity of a contract to marry, like that of any other agreement, depends upon the law of the place where such contract is entered into. Where, however, the contract is made in one state or country, with a view to solemnization of the marriage in another, there is some controversy as to which law governs. In a recent case this question came before the United States circuit court for the northern district of New York for determination. An action was brought in that court for breach of a promise of marriage made in Alabama, where the defendant resided, while the plaintiff was domiciled in New York, but at the time of the engagement was on a visit to Alabama. The defendant was the plaintiff's nephew, and by the laws of Alabama a marriage between parties so related was forbidden. When the engagement was entered into, nothing was said as to when or where the marriage should take place, but after the plaintiff's return to New York it was agreed that the marriage should be, at some convenient time, solemnized in that state, not, however, with any purpose of evading the laws of Alabama. The court held that the law of the place of the making of the contract, as to the capacity of the parties to contract, must govern even though the contract was to be performed in another state, and therefore, that the contract was void; but that even if the law of the place of performance were admitted to govern, it would not change the result, because the place of performance was not the place of solemnization of the marriage, but the place where the parties were to reside after marriage, and that in this case, if the parties intended to live in Alabama, that was the place of performance, wherever the marriage was to be solemnized. The court seemed inclined, however, to hold, if it had been necessary, that an action would not lie for breach of the contract, even though it were regarded as a New York contract, because, though not actually forbidden by the statutes of that state, it was contrary to public policy: *Campbell v. Crampton*, 18 Blatchf. 150.

2. *Statute of Frauds as Affecting Validity of Promise of Marriage.*—A promise to marry is not a promise "in consideration of marriage," so as to require it to be evidenced by writing, under the statute of frauds: *Withers v. Richardson*, 17 Am. Dec. 44; *Clark v. Pendleton*, 20 Conn. 495; *Short v. Stotts*, 58 Ind. 29; *Morgan v. Yarborough*, 5 La. Ann. 316; *Ogden v. Ogden*, 1 Bland, 284; *Hoitt v. Moulton*, 21 N. H. 593. As was said by Mills J., in *Withers v. Richardson*, 17 Am. Dec. 44: "It would be imputing to the legislature too great an absurdity to suppose that they had enacted that all our courtships, to be valid, must be in writing." But where a man promised to pay a woman two thousand dollars if she would marry him, it was held that the entire contract was within the statute of frauds: *Cushman v. Burritt*, 14 N. Y. Week. Dig. 59. Nor is a parol promise of marriage void under that section of the statute of frauds relating to contracts not to be performed within a year if it might be performed

within a year, though not agreed to be so performed; as where the promise was to marry the plaintiff within three or four years: *Paris v. Strong*, 51 Ind. 339; *Lawrence v. Cooke*, 58 Me. 187. In the latter of these cases the defendant said he could not marry the plaintiff immediately, but would marry her within four years. In both cases it was held that the promise might be performed in a year, and was, therefore, valid. So where there was a parol promise to marry upon the defendant's return from a contemplated voyage, upon which he expected to be gone eighteen months, it was held not invalid under the statute of frauds, because the defendant might return sooner: *Clark v. Pendleton*, 20 Conn. 495. So where there was no specification in the promise as to the time of performance, it was held not within the statute, because it was to be regarded, until a breach, as a continuing contract by consent of parties: *Blackburn v. Mann*, 85 Ill. 222. But where, by the terms of the contract, it is not to be performed until after the expiration of a year, it is within the statute: *Nichols v. Weaver*, 7 Kans. 373.

3. *Infant's Promise of Marriage*.—A contract to marry is regarded as beneficial, and therefore such a contract by an infant is not void, but voidable: *Cannon v. Alebury*, 10 Am. Dec. 709; *Hunt v. Peake*, 15 Id. 475; *Willard v. Stone*, 17 Id. 496. An infant party to such a contract may sue for a breach of it: *Cannon v. Alebury* and *Willard v. Stone*, *supra*. But if the infant himself is sued, his infancy is a complete defense: *Hunt v. Peake*, 15 Am. Dec. 475; *Willard v. Stone*, 17 Id. 496; *Morris v. Graves*, 2 Ind. 354; *Frost v. Vought*, 37 Mich. 65; *Leichtweiss v. Treskow*, 21 Hun. 487; *Rush v. Wick*, 31 Ohio St. 621; S. C., 27 Am. Rep. 523; *Hale v. Ruthven*, 20 L. T., N. S., 404. So even where the statute provides that infants of the age of the defendant in the particular case are capable of "contracting marriage," the statute being held to relate only to the actual marriage, and not to the prior agreement therefor: *Frost v. Vought*, 37 Mich. 65. The fact that the infant defendant has seduced the plaintiff under cover of the promise will not enable the plaintiff to sue for the breach: *Leichtweiss v. Treskow*, 21 Hun. 487.

No doubt at common law an infant under promise of marriage may, upon coming of age, ratify such promise so as to render it binding. By the English statute of 37 & 38 Vict., c. 62, sec. 2, styled the "Infant's Relief Act," it is provided, however, that no action shall be maintained upon "any ratification made after full age of any promise or contract made during infancy." Under this statute, it has been held that where a promise of marriage made during infancy is renewed after full age, no action will lie thereon unless the renewed contract is a fresh promise, and not a mere ratification or recognition of the former promise: *Coxhead v. Mullis*, L. R., 3 C. P. Div., 439; S. C., 47 L. J. C. P. 761; S. C., 39 L. T., N. S., 349. But where a defendant, while an infant, promised to marry the plaintiff, and gave her an engagement ring, and on the day after coming of age went to see the plaintiff, and told her that his father assented to the marriage, adding, "Now, I may and will marry you as soon as I can," it was left to the jury to say whether this was a fresh promise or a mere ratification of the former promise: *Northcote v. Doughty*, L. R., 4 C. P. Div., 385. And where an engagement of marriage was entered into by two infants, there being no agreement as to time of performance, and after both had come of age the defendant asked the plaintiff to fix a time for the marriage, which she did, and the defendant assented, it was held by Deeman and Lindley, JJ., Coleridge, C. J., dissenting, that this was a fresh promise, upon which an action would lie: *Ditcham v. Worrall*, L. R., 5 C. P. Div., 410; S. C., 49 L. J. C. P. 688; 43 L. T., N. S., 286; 29 Week. Rep. 59.

An infant suing for a breach of a promise of marriage need not allege the con-

sent of her parent or guardian, consent being necessary to solemnization of the marriage: *Cannon v. Alebury*, 10 Am. Dec. 709. Nor is it necessary that the complaint in such a case should show that the plaintiff was of marriageable age: *Glasscock v. Shell*, 57 Tex. 215. Infancy of the defendant is matter of defense, and the plaintiff need not allege or show that the defendant was of full age at the time of the promise: *Simmons v. Simmons*, 8 Mich. 318.

4. *Promises of Marriage by Person Already Married.*—An action will lie for a breach of a promise of marriage made by a person already married at the time of the promise, if the plaintiff was ignorant of that fact: *Kelley v. Riley*, 106 Mass. 333; S. C., 8 Am. Rep. 338; *Blattmacher v. Saal*, 29 Barb. 22; *Stevenson v. Pettis*, 12 Phila. 468; *Cover v. Davenport*, 1 Heisk. 368; S. C., 2 Am. Rep. 706; *Pollock v. Sullivan*, 53 Vt. 507; S. C., 38 Am. Rep. 702; *Wild v. Harris*, 7 Com. B. 999; S. C., 7 Dowl. & L. 114; S. C., 18 L. J. C. P. 297; 13 Jur. 961; *Millward v. Littlewood*, 5 Exch. 775; S. C., 20 L. J. Ex. 2. And it is held that the action will lie even where the plaintiff, after discovering the fact that the defendant is already married, continues the contract, and agrees to marry him upon an expected separation from his wife: *Cover v. Davenport*, 1 Heisk. 368; S. C., 2 Am. Rep. 706. The action may be either on the contract, or in case for the deceit: *Pollock v. Sullivan*, 53 Vt. 507; S. C., 38 Am. Rep. 702; *Blattmacher v. Saal*, 29 Barb. 22. It is held, however, in *Pollock v. Sullivan*, 53 Vt. 507; S. C., 38 Am. Rep. 702, that if the form of action is *assumpsit* for the breach in such a case, and the defendant should be foolhardy enough to tender performance, the plaintiff must desist or subject herself to a criminal prosecution. With great deference for the opinion of this learned court, we submit, however, that a formal tender of performance in such a case would be no defense. It would be a sham on the face of it. Besides, where there has been an actual breach, a subsequent tender of performance is of no more avail than a tender of performance of any other contract already broken. Where the defendant is married at the time of the promise, the contract is broken as soon as it is made, and, as it seems to us, the plaintiff may sue immediately upon discovery of the fact.

A leading case on this subject is *Wild v. Harris*, 7 Com. B. 999; S. C., 7 Dowl. & L. 114; S. C., 18 L. J. C. P. 297; 13 Jur. 961. The declaration in that case averred that in consideration that the plaintiff, being sole and unmarried, at the request of the defendant had promised the defendant to marry the defendant within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; that the plaintiff, confiding in the promise of the defendant, had from thenceforward remained sole and unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him; that although a reasonable time had elapsed since the making of the defendant's promise, yet the defendant had not married the plaintiff, but on the contrary thereof, the defendant, at the time of making his promise and from thenceforward, had been and still was married, etc.; and that the plaintiff did not know at the time of the defendant's making his said promise to her, nor for a long time afterwards, that the defendant was married. The plaintiff having obtained a verdict, it was held, on a motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the plaintiff's promise. Wilde, C. J., in delivering the opinion, said: "On behalf of the defendant, it has been contended that inasmuch as the declaration discloses that the defendant was a married man at the time of the making of the alleged promise, so that the plaintiff was not bound by her promise to marry the defendant, there was a total absence of consideration. But the declaration alleges a promise by the plaintiff to marry the defendant within

a reasonable time, which involves within it a promise to remain single for a reasonable time; and this the plaintiff avers that she did do; and that is consideration enough. And the defendant's promise to marry the plaintiff within a reasonable time was not absolutely impossible of performance, for his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff." This case was approved and followed in *Millward v. Littlewood*, 5 Exch. 775; S. C., 20 L. J. Ex. 2.

Of course where the plaintiff, at the time of the promise, knows that the defendant is married, and the promise is to marry on procuring a divorce, the action will not lie, such a contract being void as against public policy: *Paddock v. Robinson*, 63 Ill. 99; *Noice v. Brown*, 38 N. J. L. 228; S. C., 39 Id. 133. So where a suit for divorce is pending at the time of the promise: *Noice v. Brown, supra*.

5. *Promise of Marriage on Immoral Consideration, against Law or Public Policy.*—A promise of marriage in consideration of illicit intercourse is void, and no action will lie thereon: *Hanks v. Nagle*, 54 Cal. 51; S. C., 35 Am. Rep. 67; *Steinfeld v. Levy*, 16 Abb. Pr. 26; *Baldy v. Stratton*, 11 Pa. St. 316; *Goodall v. Thurman*, 1 Head, 209; *Lewis v. Goetchius*, 20 N. Y. Week. Dig. 140. So a promise of marriage by a man to his mistress in consideration of her continuing in the unlawful relation: *Boigneres v. Boulon*, 54 Cal. 146. But a promise to marry a woman at a certain time, but to marry her immediately if she should become pregnant by him, is not void on the ground of immorality of the consideration, for the sexual intercourse is not the consideration of the promise, the agreement respecting the event of pregnancy merely relating to fixing the time of performance: *Kurtz v. Frank*, 76 Ind. 594; S. C., 40 Am. Rep. 275. A promise made after the defendant has seduced the plaintiff, that she shall come to no harm by him, and that if she did he would marry her, where she is at the time pregnant, is binding: *Hotchkiss v. Hodge*, 38 Barb. 117. A promise of marriage by a divorced man prohibited by the decree of divorce from remarrying in the life-time of the divorced wife is void, and no action will lie thereon: *Haviland v. Halstead*, 34 N. Y. 643. So it is held that a promise of marriage by one incurably impotent is against public policy, and no action will lie for a breach thereof: *Gulick v. Gulick*, 41 N. J. L. 13. A promise by the defendant to marry the plaintiff if he ever married is, it seems, void as in restraint of marriage: *Conrad v. Williams*, 6 Hill, 444.

6. *Promise of Marriage under Duress, or Induced by Fraud.*—A promise to marry made under duress is unquestionably not binding, but it does not vitiate another promise made at a time when the party was not under duress: *McCrumb v. Hildebrand*, 85 Ind. 204. So where the defendant was induced to enter into or continue a contract of marriage by misrepresentations or willful suppression of facts as to the plaintiff's family or prior habits of life, by the plaintiff herself or with her consent, he may undoubtedly avoid the contract: *Wharton v. Lewis*, 1 Car. & P. 529; *Foote v. Hayne*, Id. 545. So where the representations were made in letters written by the plaintiff's father, and she knew that the letters had been written, but did not know their exact contents, they were admitted in evidence against her: *Foote v. Hayne, supra*. Not so where the representations were made verbally by the plaintiff's father to a third person, and communicated to the defendant, the plaintiff not being present on either occasion: Id. The defense that the promise was fraudulently obtained must, it seems, be alleged in order to be available: *Lessitt v. Culver*, 37 Wn. 54. It is held, however, in *Wharton v. Lewis*, 1 Car. & P. 529,

that if the defendant's counsel indicates by his cross-examination of the plaintiff's witnesses that he intends to rely upon misrepresentations and deceptions by the plaintiff inducing the promise, this is sufficient notice of the defense, and the plaintiff must introduce, before closing, any letters or other evidence showing that the defendant knew the facts concerning which the representations were made.

The defense of unchaste character of the plaintiff, and some other defenses to be hereafter considered, no doubt come under the general head of fraud and concealment.

SUFFICIENCY OF CONTRACT TO MARRY—MUTUAL PROMISES, NECESSITY OF.—It is essential to a contract to marry that the minds of the parties should meet. The promise by the defendant must have been made or communicated to the plaintiff by the defendant personally or by his authority. If it was made to a third person in the plaintiff's absence, and not authorized to be communicated to her, no action will lie for a breach: *Cole v. Cottingham*, 8 Car. & P. 75. Furthermore, there must be mutual promises: *Eypy v. Jones*, 1 Ala. Sel. Cas. 454; *King v. Kersey*, 2 Ind. 402; *Cates v. McKinney*, 48 Id. 562; S. C., 17 Am. Rep. 768; *Allard v. Smith*, 2 Meto. (Ky.) 297; *Morgan v. Yarborough*, 5 La. Ann. 316; *Standiford v. Gentry*, 32 Mo. 477; *Hoult v. Moulton*, 21 N. H. 593; *Homan v. Earle*, 53 N. Y. 267; *Ellis v. Guggenheim*, 20 Pa. St. 287. No particular form of words is essential; it is sufficient if the evidence shows that the minds of the parties met, and that the engagement was mutually agreed on: *Homan v. Earle*, 53 N. Y. 267. The reciprocal promises must also be within a reasonable time of each other: *Vensall v. Veness*, 4 F. & F. 344.

Contrary to the doctrine of most of the cases on this subject, it seems to be held in *Harvey v. Johnston*, 6 Dowl. & L. 120; S. C., 6 Com. B. 295; 17 L. J. C. P. 296; 12 Jur. 981, that a promise by the plaintiff is not essential as the consideration of the defendant's promise. There is no doubt, however, that mutual promises of marriage, without more, are a sufficient consideration for each other: *Burks v. Shain*, 5 Am. Dec. 616.

CONSTRUCTION AND EFFECT OF PROMISE OF MARRIAGE.—With respect to the time of performance of a promise of marriage, if no time is specified, it is a promise to marry within a reasonable time, upon the plaintiff's request: *Atchinson v. Baker*, Peake's Add. Cas. 103; *Blackburn v. Mann*, 85 Ill. 222; *Cole v. Holliday*, 4 Mo. App. 94; *Wagenseller v. Simmers*, 97 Pa. St. 465; S. C., 10 Week. Notes Cas. 353; *Stevenson v. Pettis*, 12 Phila. 468. So where it is said at the time of the promise that the marriage may take place in one year or in ten years: *Blackburn v. Mann*, 85 Ill. 222. Where the promise is to marry when certain buggies are done, and nothing is said as to when they are to be done, the law implies that the promise is to be performed in a reasonable time: *Bennett v. Beam*, 42 Mich. 346; S. C., 36 Am. Rep. 442. In determining what is a reasonable time for the performance of a contract to marry, the age and pecuniary circumstances of the parties are to be considered: *Wagenseller v. Simmers*, 97 Pa. St. 465; S. C., 10 Week. Notes Cas. 353. The date of the proposed marriage need not be proved as laid if alleged under a *videlicet*: *Prescott v. Gayler*, 32 Ill. 312. The place of performance of the contract, it has been held, as already stated, is the place where the parties are to reside after the marriage, and not the place of solemnization: *Campbell v. Crampton*, 18 Blatchf. 150. As to the place of solemnization, that is assumed to be at the place of the female party's residence if nothing is said on that point: *Graham v. Martin*, 64 Ind. 567.

Where the promise is to marry according to the rules and customs of a

particular church, such rules and customs become a part of the contract, and the plaintiff cannot require performance in any other way: *Stone v. Appel*, 12 Ill. App. 582.

A promise of marriage is conditional where it is a promise to marry "as soon" as the plaintiff's "business is settled," and performance of the condition must be shown to sustain the action: *Cole v. Cottingham*, 8 Car. & P. 75.

EVIDENCE OF PROMISE OF MARRIAGE, AND ACCEPTANCE AND REBUTTAL THEREOF.—Admissions and declarations of the defendant, otherwise competent, are undoubtedly evidence of a promise of marriage on his part: *Southerard v. Rexford*, 6 Cow. 255; *Leckey v. Bloser*, 24 Pa. St. 401, as where the defendant declared that he would make a good home for the plaintiff, or would build and furnish a house for her: *Button v. McCausley*, 1 Abb. App. Dec. 282. Admissions exacted from the defendant by threats of violence by the plaintiff's father, with weapon in hand, are not competent evidence of a promise of marriage: *Fidler v. McKinley*, 21 Ill. 308. Nor are declarations of the defendant's mother to the plaintiff, in the defendant's absence, and not communicated to him, admissible: *Lawrence v. Cooke*, 56 Me. 187. Vague admissions by the defendant, not clearly referring to a promise of marriage, are not competent evidence of such promise, as in case of an admission in answer to the remark, "You know what you promised": *Weaver v. Bachert*, 44 Am. Dec. 159. The plaintiff's answer to a message sent to her by the defendant, promising marriage, is competent evidence of a promise or acceptance on her part: *Ellis v. Guggenheim*, 20 Pa. St. 287. So declarations made by the plaintiff to her family, while receiving the defendant's attentions, are competent to show an acceptance on her part: *King v. Kersey*, 2 Ind. 402; *Wetmore v. Mell*, 1 Ohio St. 26. And generally, after proof of the defendant's promise, the plaintiff may introduce her own declarations to show acceptance: *Moritz v. Melhorn*, 13 Pa. St. 331; *Leckey v. Bloser*, 24 Id. 401. But declarations made by the plaintiff, after suit brought or after the breach, are not admissible: *Wetmore v. Mell*, 1 Ohio St. 26.

Evidence of an epistolary correspondence between the parties, there being no relationship between them, is competent to show the promise: *Hoitt v. Moulton*, 21 N. H. 586. The plaintiff may prove by parol that letters have passed between the parties, without producing them: *Conaway v. Shelton*, 3 Ind. 334. The letters of the defendant to the plaintiff expressing love and affection are unquestionably admissible to prove the promise: *Tefft v. Marsh*, 1 W. Va. 38. So letters in the plaintiff's possession addressed to her given name, without any surname, and in the defendant's handwriting, are competent, her possession being *prima facie* evidence that they are hers: *Id.* The plaintiff may, it seems, also introduce her own letters to the defendant before the breach: *Vanderpool v. Richardson*, 17 N. W. Rep. 936. Where the plaintiff introduces the defendant's letters, and the defendant fails to produce the plaintiff's letters in reply, it does not warrant an instruction that the jury may draw the strongest inferences as to the contents of the letters, because a party is not bound to produce the declarations of his adversary: *Law v. Woodruff*, 48 Ill. 399.

In England the court will, in a breach of promise suit, grant either party an inspection of letters between them in the possession of his adversary: *Stone v. Strange*, 3 H. & C. 541; S. C., 34 L. J. Ex. 72; 11 Jur., N. S., 164; 11 L. T., N. S., 717; 13 Week. Rep. 350; *Pape v. Lister*, L. R., 6 Q. B., 242; S. C., 40 L. J. Q. B. 87; 24 L. T., N. S., 70; 19 Week. Rep. 445.

Direct evidence of an express promise of marriage is not essential in an action for a breach of such promise. The promise may be proved by circum-

stantial or presumptive evidence. It may be implied from conduct and behavior of the parties appropriate to a matrimonial engagement, and from other circumstances: *Wightman v. Coates*, 8 Am. Dec. 77; *Munson v. Hastings*, 36 Id. 345; *Waters v. Bristol*, 28 Conn. 398; *Blackburn v. Mann*, 85 Ill. 222; *McCrum v. Hildebrand*, 85 Ind. 204; *Thurston v. Cavenor*, 8 Iowa, 155; *Royal v. Smith*, 40 Id. 615; *Hoitt v. Moulton*, 21 N. H. 593; *Coil v. Wallace*, 24 N. J. L. 291; *Southerard v. Rexford*, 6 Cow. 255; *Hubbard v. Bonesteel*, 16 Barb. 360; *Hotchkiss v. Hodge*, 38 Id. 117; *Homan v. Earle*, 53 N. Y. 267; *Moritz v. Melhorn*, 13 Pa. St. 331; *Leekey v. Bloser*, 24 Id. 401; *Von Storch v. Griffin*, 77 Id. 504; *Wagenseller v. Simmers*, 97 Id. 465; *Perkins v. Hersey*, 1 R. I. 493; *Tefft v. Marsh*, 1 W. Va. 38.

Green, C. J., delivering the opinion of the court, in *Coil v. Wallace*, 24 N. J. L. 304, said: "In the nature of things, it is impossible to designate, by any fixed rule, the circumstances from which an inference of an existing promise of marriage may legitimately be drawn. It depends in great measure upon the customs and usages of social life; indeed, the acts and conduct of parties which may satisfactorily indicate the existence of a mutual engagement are, in many cases, the result of the arbitrary usages of society; acts which in one circle of society would be regarded as a clear indication of an existing engagement, in another sphere of life would be totally insignificant. The force of the circumstances it is peculiarly the province of the jury to decide. If the circumstances be relevant, and the existence of the engagement be a legitimate inference more or less clear from the evidence, the verdict should not be disturbed." Circumstantial evidence of an engagement consists generally "of letters, presents, attention, visiting in company, preparing for housekeeping, and the like. There may be other circumstances which would satisfy a jury of an engagement to marry. But the circumstances which warrant such a conclusion must not be attentions which are consistent with the mere pursuit of lust; they must be those finer acts which mark an honorable intention." *Commonwealth v. Weston*, 2 Brewst. 488. Mere attentions, though long continued, do not of themselves constitute a contract: *Munson v. Hastings*, 12 Vt. 346; S. C., 36 Am. Dec. 345; *Whitcomb v. Wolcott*, 21 Id. 368. And attentions such as might be paid to a woman engaged to another are not evidence of a promise: *Johnson v. Leggett*, 28 Kans. 602. Nor are the ordinary politeness and civility that a gentleman shows to a lady to be regarded as evidence of a promise to marry: *Perkins v. Hersey*, 1 R. I. 493. A promise may undoubtedly be implied from circumstances. But such circumstances must be unequivocal and definite: *Homan v. Earle*, 53 N. Y. 267; *Thurston v. Cavenor*, 8 Iowa, 155. Apparent courtship, preparations by the female plaintiff, and professions of attachment by the defendant, do not furnish evidence of a mutual promise: *Weaver v. Bachert*, 2 Pa. St. 80; S. C., 44 Am. Dec. 159. In *Walmsley v. Robinson*, 63 Ill. 41, it was held that an instruction that a promise may be inferred—1. From the conduct of the parties; 2. From circumstances which usually attend an engagement to marry, as visiting, the understanding of friends and relatives, preparations for marriage, reception of the defendant by the plaintiff's family as a suitor—was too broad, and therefore erroneous.

ACCEPTANCE OF DEFENDANT'S PROMISE MUST BE SHOWN, but it need not be by words. It may be inferred from circumstances: *Morgan v. Yarborough*, 5 La. Ann. 316; *Wells v. Padgett*, 8 Barb. 323; *Daniel v. Bowles*, 2 Car. & P. 553. And evidence that the plaintiff prepared for the wedding by procuring a dress and wedding-cake, and declarations made to her sister explanatory of such acts, are admissible, after proof of the promise, to show

its acceptance: *Wilcox v. Green*, 23 Barb. 639. And acts of the plaintiff done out of the presence of the defendant are admissible in evidence for that purpose: *Thurston v. Cavenor*, 8 Iowa, 155. But evidence of the plaintiff's preparations for the wedding, in the absence of the defendant and in no way connected with him, is inadmissible to prove the plaintiff's assent to the contract: *Russell v. Cowles*, 15 Gray, 582.

To CORROBORATE TESTIMONY OF EXPRESS PROMISE, all the facts and circumstances that have taken place between the parties are admissible in evidence, and proper for the consideration of the jury: *Richmond v. Roberts*, 98 Ill. 472; *Johnson v. Leggett*, 28 Kan. 590; *People v. Kenyon*, 5 Park. Cr. 254. And evidence of the acts and conversations of the parties, during a prior intimacy between them afterwards broken off, before the promise, is admissible for that purpose: *Ray v. Smith*, 9 Gray, 141. But the possession of a wedding or engagement ring is not, *per se*, corroborative evidence of an engagement to marry, without other proof of the circumstances under which it was given: *Commonwealth v. Walton*, 2 Brewst. 487. Under the statute of 32 & 33 Vict., c. 68, the plaintiff's testimony as to the promise must be corroborated in an action for breach of promise of marriage. Under this statute it is held that the defendant's failure to appear as a witness to deny the promise is corroborative of the plaintiff's testimony: *Willcox v. Goffrey*, 26 L. T., N. S., 328. And the corroboration of the plaintiff by a witness who remembers only part of the declarations made by the defendant is sufficient: *Hickey v. Campion*, 6 Irish R. C. L. 557; S. C., 20 Week. Rep. 752. And confirmatory evidence, though not sufficient to prove the whole contract, is, if material, sufficient "material evidence in support of the promise," under the statute: *Bessela v. Stern*, L. R., 2 C. P. Div., 265; S. C., 46 L. J. C. P. 467; S. C., 37 L. T., N. S., 88; S. C., 25 Week. Rep. 561. But acts done before the promise are no corroboration of it, such as is required by the statute: *Willcox v. Goffrey*, *supra*.

To REBUT IMPLICATION OF PROMISE, the fact that the plaintiff told the defendant that she was engaged to another may be given in evidence: *Johnson v. Leggett*, 28 Kan. 603. But proof of the plaintiff's actual engagement to another, pending at the time of the defendant's attentions to her, does not, as a matter of law, overcome the inference from such attentions, of her engagement to the defendant, though it is proper for the jury, as tending to overcome it: *Doubet v. Kirkman*, 15 Brad. App. 622.

BREACH OF CONTRACT TO MARRY, AND EVIDENCE THEREOF.—In order to show a breach of the contract by the defendant, the readiness of the plaintiff to perform is material and must be proved: *Graham v. Martin*, 64 Ind. 567. For the defendant is not in default unless the plaintiff was ready and willing to perform at the time fixed: *Fible v. Coplinger*, 13 B. Mon. 464. And it is for the jury to decide whether or not the plaintiff was ready and willing: *McCormick v. Robb*, 24 Pa. St. 44. But the plaintiff, by proving a promise, breach thereof, and loss, makes a *prima facie* case, and it then rests upon the defendant to show vindication on his part: *Johnson v. Smith*, 3 Pittab. 184. An offer by the plaintiff to perform, and a refusal by the defendant, must be shown in order to maintain an action: *Weaver v. Bachert*, 2 Pa. St. 80; S. C., 44 Am. Dec. 159; *Fidler v. McKinley*, 21 Ill. 308. Particularly where there has been no time fixed for the marriage: *Fible v. Coplinger*, 13 B. Mon. 464; or where the defendant has not married another: *Gough v. Farr*, 2 Car. & P. 631. But a request and refusal to perform may be proved by circumstances: *Greenup v. Stoker*, 3 Gilm. 202; *Lawrence v. Cooke*, 56 Me. 194. And positive proof of a request and refusal is never required under a

count alleging a promise to marry on request: *Prescott v. Gayler*, 32 Ill. 312. The plaintiff need not formally tender marriage before suit if the contract has been broken off by the defendant: *Willard v. Stone*, 7 Cow. 22; S. C., 17 Am. Dec. 496; *McCormick v. Robb*, 24 Pa. St. 44. No request by the plaintiff is necessary where the defendant has renounced his promise: *Kurtz v. Frank*, 76 Ind. 594; S. C., 40 Am. Rep. 275; *Greenup v. Stoker*, 3 Gilm. 202; *Wagener v. Simmers*, 97 Pa. St. 465. And the plaintiff need not show tender of marriage where the defendant has put it out of her power by absconding: *Johnson v. Caulkins*, 1 Johns. Cas. 116; S. C., 1 Am. Dec. 102. And generally an actual request and refusal need not be shown if by the conduct of the defendant it is made to appear that he had an unequivocal intention not to fulfill the contract: *Cole v. Wallace*, 24 N. J. L. 29. Proof of defendant's marriage to another avoids the necessity of a tender or request by the plaintiff, and gives an immediate right of action: *Sheahan v. Barry*, 27 Mich. 217; *Pettigill v. McGregor*, 12 N. H. 179; *Lahey v. Knott*, 8 Or. 198. And for the purpose of proving marriage to another, evidence tending to prove cohabitation as man and wife is competent, and sufficient to go to the jury: *Pettigill v. McGregor*, *supra*. Where the defendant renounces the contract before the time fixed for performance, the plaintiff may treat such renunciation as a breach, and sue at once: *Kurtz v. Frank*, 76 Ind. 594; S. C., 40 Am. Rep. 275; *Holloway v. Griffith*, 32 Iowa, 409; S. C., 7 Am. Rep. 208; *Burtis v. Thompson*, 42 N. Y. 246; *Donoghue v. Marshall*, 32 L. T., N. S., 310; *Cherry v. Thompson*, L. R., 7 Q. B., 574; S. C., 41 L. J. Q. B. 243; S. C., 26 L. T. 791; S. C., 20 Week. Rep. 1029.

The offer or request on the part of the plaintiff need not be made by her personally. It may be made by her father, or some other friend, whose authority may be inferred from the relations existing between the parties: *Prescott v. Gayler*, 32 Ill. 312; *Cole v. Holliday*, 4 Mo. App. 94; *Kniffen v. McConnell*, 30 N. Y. 285.

Where no time is agreed upon for the performance of the promise, the law implies performance within a reasonable time. And no definite time is necessary to give a right of action for the breach: *Blackburn v. Mann*, 85 Ill. 222; *Cole v. Holliday*, 4 Mo. App. 94. Where the engagement was to marry "in the fall," and the defendant in the month of October announced that he would not perform the contract, it was held that the action might be commenced immediately: *Burtis v. Thompson*, 42 N. Y. 246. And where the defendant promised to marry the plaintiff as soon as his father died, it was held that the plaintiff could sue, while the defendant's father was still alive, where the defendant refused to marry her during his father's life-time: *Frost v. Knight*, L. R., 7 Ex., 111; S. C., 41 L. J. Ex. 78; 26 L. T. 77; 20 Week. Rep. 471; reversing S. C., L. R., 5 Ex., 322; 29 L. J. Ex. 277; 23 L. T. 714; 19 Week. Rep. 77. Where the breach was laid on the eleventh day of November, and the evidence was that it was on the fifteenth, it was held sufficient to support the verdict: *Holloway v. Griffith*, 32 Iowa, 409. Omission to marry on a particular day is no breach. The promise necessarily continues in force until one or the other of the parties by words or conduct shows that he or she is unwilling to proceed to the ordinary result: *Kelly v. Renfro*, 9 Ala. 325; S. C., 44 Am. Dec. 441. And where the marriage was inadvertently set for a day on which marriage was forbidden by the church to which the defendant belonged, it was held that a refusal by the defendant to marry on that day was not a breach of his promise if he was willing and ready to marry the plaintiff at any reasonable time thereafter: *Stone v. Appel*, 12 Brad. App. 582. Both the promise to marry and the breach thereof may be proved by circumstantial evidence: *Hubbard v. Bonesteele*, 16 Barb. 360.

PLEADINGS IN ACTIONS FOR BREACH OF PROMISE TO MARRY.—The complaint in an action for breach of promise of marriage should allege a mutual promise. But an allegation that the defendant entered into a contract with the plaintiff "on a certain day, by which it was agreed by and between them both that they would get married in the month of September following," etc., though informal, is sufficient: *Cates v. McKinney*, 48 Ind. 582. So an allegation that the plaintiff, being sole and unmarried, promised to go to a certain place for the purpose of marrying the defendant, was held to sufficiently allege a consideration for the promise: *Harvey v. Johnston*, 6 Dowl. & L. 120; S. C., 6 Com. B. 295; S. C., 17 L. J. C. P. 298; S. C., 12 Jur. 9081. An allegation that the defendant promised to marry the plaintiff in consideration that she would promise to marry him is defective. It should have been that she did promise to marry him. But the defect is cured by verdict: *Felger v. Etzell*, 75 Ind. 417. So an averment that at the special instance, etc., of the defendant, the plaintiff promised to marry him, without alleging that he promised to marry her, and that not regarding his said promise to marry her, etc., is good after verdict, although it would be held bad on demurrer: *Roper v. Clay*, 18 Mo. 383; S. C., 59 Am. Dec. 314. An offer of performance must be averred where there is no time stated in the promise: *Burks v. Shain*, 2 Bibb, 341; S. C., 5 Am. Dec. 616. But where the promise is to marry on a particular day no request need be alleged: *Graham v. Martin*, 64 Ind. 567; *Haymond v. Saucer*, 84 Id. 3. Where the defendant's marriage with another is alleged, an averment of request is unnecessary: *King v. Kersey*, 2 Id. 402; *Graham v. Martin*, 64 Id. 567; *Hunter v. Hatfield*, 68 Id. 416. And where the complaint sets out the defendant's marriage to another, it is good, after verdict, even though it does not aver the plaintiff's continued readiness to marry: *Hunter v. Hatfield*, *supra*. A declaration showing that defendant has married another, with out averring the lapse of reasonable time, shows a sufficient breach: *Comins v. Smith*, 15 Mee. & W. 189; S. C., 3 Dowl. & L. 482; S. C., 15 L. J. Ex. 106. And a request need not be averred if the declaration shows a promise to marry in a reasonable time after request, and that after the promise, and before action, the defendant married another, although it is not averred that such other person is still living: *Short v. Stone*, 8 Q. B. 358; S. C., 3 Dowl. & L. 580; S. C., 15 L. J. Q. B. 143; S. C., 10 Jur. 245. An allegation that the plaintiff, relying upon the defendant's promise to marry her, and that he infected her with venereal disease, was held to be an allegation of "material facts," within the meaning of order 19, rule 4, and properly pleadable: *Millington v. Loring*, L. R., 6 Q. B. Div., 190; S. C., 50 L. J. Q. B. 214; S. C., 43 L. T. 657; S. C., 29 Week. Rep. 207. A count for a breach of promise to marry is not affected by a count for seduction joined with it, and the latter count may be disregarded: *Roper v. Clay*, 18 Mo. 383; S. C., 59 Am. Dec. 314. In *Frean v. Watley*, F. & F. 1038, a count for breach of promise of marriage was joined with the money counts, and the court directed separate trials. And in *Sherratt v. Webster*, 9 Jur., N. S., 629; S. C., 8 L. T., N. S., 254, the court refused permission to add to a count for breach of promise of marriage a count for arrears of an annuity.

DEFENDANT MAY PLEAD accord and satisfaction by a new agreement to now marry: *Smith v. Jenkins*, 28 L. T., N. S., 562. A plea that the plaintiff was engaged to another at the time of the contract, and did not disclose that fact to the defendant, no fraud being alleged, is bad: *Beachy v. Brown*, El. Bl. & El. 796; S. C., 29 L. J. Q. B. 105; 6 Jur., N. S., 345; 8 Week. Rep. 292. That the plaintiff, before breach, absolved, discharged, and exonerated the defendant from performance is a good defense; but to support such plea, it must be shown

that there was a proposition to exonerate, and assent thereto: *King v. Gillett*, 7 Me. & W. 55. Pleas of fornication with others before the promise, unknown to the defendant, or of fornication with others after the promise, and the having of a bastard, are a sufficient defense: *Young v. Murphy*, 3 Bing. N. C. 54; S. C., 3 Scott, 379; 2 Hodge, 144.

DEFENSES.—1. *Plaintiff's Unchastity*, if not known to the defendant at the time the promise was made, is a good defense to an action for a breach of promise of marriage: *Irving v. Greenwood*, 1 Car. & P. 350; *Espy v. Jones*, 1 Ala. Sel. Cas. 454; *Woodard v. Bellamy*, 2 Root, 354; *Butler v. Echelman*, 18 Ill. 44; *Fedler v. McKinley*, 21 Id. 308; *Burnett v. Simpkins*, 24 Id. 264; *Doubt v. Kirkman*, 15 Brad. App. 622; *Druslow v. Van Horn*, 16 Iowa, 476; *Guptill v. Verback*, 58 Id. 98; *Morgan v. Yarborough*, 5 La. Ann. 316; *Cole v. Holliday*, 4 Mo. App. 94; *Johnson v. Caulkins*, 1 Johns. Cas. 116; S. C., 1 Am. Dec. 102; *Willard v. Stone*, 7 Cow. 22; S. C., 17 Am. Dec. 496; *Von Storch v. Griffin*, 77 Pa. St. 504; *Williams v. Hollingsworth*, 6 Baxt. 12. And an unsuccessful attempt to show that the plaintiff is a lewd woman will not be considered an aggravation, if made in good faith: *Fedler v. McKinley*, 21 Ill. 308. Such a defense is admissible under the plea of *non assumpsit*, because it goes to the consideration: *Von Storch v. Griffin*, 77 Pa. St. 504. And evidence that the plaintiff had lived with a woman who kept a bad house is admissible under an answer charging her to be an immoral woman: *Hunter v. Hatfield*, 68 Ind. 416. But evidence of the plaintiff's bad character is no defense, if it was the result of the defendant's own acts: *Butler v. Echelman*, 18 Ill. 44. The bad character of the plaintiff may be proved by witnesses who have heard her character discussed in the neighborhood: *Foulkes v. Selloway*, 3 Esp. 236. But evidence of mere accusations, rumors, or suspicions is not admissible to prove the plaintiff's bad character: *Baderley v. Morilock*, Holt, 151; *Willard v. Stone*, 7 Cow. 22; S. C., 17 Am. Dec. 496. The injurious reports must be shown to have had a reasonable foundation: *Capehart v. Carradine*, 4 Strob. 42. Evidence that the plaintiff's brother kept a bawdy-house is not admissible without evidence tending to connect her therewith: *Sherman v. Rawson*, 102 Mass. 395.

That plaintiff had had a bastard ten years before the promise, though she had since lived a correct life, the defendant having no notice of the facts, is a good defense: *Bench v. Merrick*, 1 Car. & Kir. 463. And so is the fact that the plaintiff fraudulently concealed from the defendant the fact that she had had a bastard: *Bell v. Eaton*, 28 Ind. 463.

Evidence of plaintiff's lewd conduct is not admissible in bar of the action if not pleaded, but it may be given in evidence to mitigate the damages: *Tompkins v. Wadley*, 3 Thomp. & C. 424; *Knifens v. McConnell*, 30 N. Y. 285. And evidence of plaintiff's incontinence before or during the engagement, where the defendant, after seduction, breaks off the engagement without knowledge of the incontinence, is no bar, but goes in mitigation merely: *Shea-han v. Barry*, 27 Mich. 217. Mutual improprieties and lewdness are not a bar to the action, and evidence of them is not admissible, either in mitigation or aggravation: *Johnson v. Smith*, 3 Pittab. 184. Nor is the reputation of the plaintiff acquired after the commencement of the action admissible as a defense: *Capehart v. Carradine*, 4 Strob. 42.

2. *Plaintiff's Unchastity, Known to Defendant* at the time when the promise was made, is no defense: *Irving v. Greenwood*, 1 Car. & P. 350; *Bench v. Merrick*, 1 Car. & Kir. 463; *Espy v. Jones*, 1 Ala. Sel. Cas. 454; *Sprague v. Craig*, 51 Ill. 288; *Druslow v. Van Horn*, 16 Iowa, 476; *Snowman v. Wardwell*, 32 Me. 275; *Berry v. Bakeman*, 44 Id. 164; *Johnson v. Smith*, 3 Pittab. 184; *Von*

Storch v. Griffin, 77 Pa. St. 77. Nor is her immorality with other persons after the promise any defense, if with his consent or connivance: *Johansen v. Smith*, 3 Pittsb. 184. And fornication by the plaintiff with other persons after the promise is no defense if, knowing of it, he continued his attentions and his engagement: *Snowman v. Wardwell*, 32 Me. 275. In *Sprague v. Craig*, 51 Ill. 288, it was held that the unchastity of the plaintiff after the promise absolves defendant from the engagement, whether it was known to him or not.

Plaintiff may give evidence in rebuttal of her good character for chastity after evidence has been given of particular acts of indiscretion on her part: *Haymond v. Saucer*, 84 Ind. 3. And she may give evidence of general character to rebut testimony showing unchastity on her part: *Sprague v. Craig*, 51 Ill. 288. But in *Leckey v. Bloser*, 24 Pa. St. 401, it was held that evidence of plaintiff's good character is not admissible in rebuttal of specific instances of indiscretion in suffering improper liberties by a third person. In *Jones v. James*, 18 L. T., N. S., 243; S. C., 16 Week. Rep. 762, it was held that the plaintiff could give general evidence of good character in the first instance, where the defendant charged her with general immodest conduct with other men after the promise, as a justification of his refusal to marry her.

3. *Offer to Marry as Defense*.—The defendant's *bona fide* offer to marry the plaintiff is a full defense to the action for breach of promise, if it is made before the plaintiff has signified her determination to end the engagement, although the defendant may have been guilty of conduct that would warrant the plaintiff in considering the engagement at an end: *Kelly v. Renfro*, 9 Ala. 325; S. C., 44 Am. Dec. 441. But the defendant's offer to renew the contract after breach is no defense: *Kurtz v. Frank*, 76 Ind. 594; S. C., 40 Am. Rep. 275; *Southard v. Rexford*, 6 Cow. 255; and neither is an offer made by the defendant, communicated to the plaintiff's attorney but not shown to have been communicated to her before suit, where she subsequently refused the offer: *Dennis v. McKenzie*, 24 L. T., N. S., 363. But it seems that the defendant's offer to marry the plaintiff after breach may be admissible in mitigation of damages: *Kurtz v. Frank*, 76 Ind. 594; S. C., 40 Am. Rep. 275. Where, however, the defendant seduced the plaintiff, his offer to marry, made after the commencement of the action, is not admissible to mitigate the damages, and the plaintiff cannot be asked if she is now willing to marry him: *Bennett v. Beam*, 42 Mich. 346.

4. *Various Other Defenses*.—Evidence of intemperate habits on the part of the plaintiff is admissible in mitigation under the general issue, unless the defendant connived at her intemperance: *Button v. McCauley*, 1 Abb. App. Dec. 282. But evidence of the plaintiff's intemperate habits, without stating under what circumstances she drank to excess, or showing her general reputation as to sobriety to be bad, is not admissible: *Button v. McCauley*, 38 Barb. 413. Violation of the criminal law by the plaintiff is no defense, where there is no evidence that the defendant was informed thereof, or that he refused marriage on that account: *Berry v. Bakeman*, 44 Me. 164. It is no defense that the defendant thought that the marriage would not conduce to the happiness of both, and for that reason broke off the engagement: *Coolidge v. Neat*, 129 Mass. 146. Nor is the defendant's loss of affection for the plaintiff before suit any defense or mitigation: *Richmond v. Roberts*, 98 Ill. 472. That the defendant, after the promise, became afflicted with an incurable disease, causing bleeding at the lungs, and could not marry without danger to life, is not a good defense: *Hall v. Wright*, El. Bl. & El. 746; S. C., 29 L. J. Q. B. 43; S. C., 6 Jur., N. S., 193; S. C., 8 Week. Rep. 160.

That the defendant was afflicted with a loathsome disease, rendering him

unfit to marry, is no defense, if the disease was contracted after the promise, or if before and he knew that the disease was incurable; *aliter* if he had reason to believe it was temporary only: *Allen v. Baker*, 86 N. C. 91; S. C., 41 Am. Rep. 444. It is no defense that the plaintiff had been insane and confined in an insane asylum before the promise, if she was sane at the time of the promise: *Baker v. Cartwright*, 10 C. B., N. S., 124; S. C., 30; L. J. C. P. 364; 7 Jur., N. S., 1247. Proof of frequent intermarriages of the ancestors of the parties, and of the evil tendency of marriages among relations, is not admissible in defense where the marriage was not broken off on that ground: *Simmons v. Simmons*, 8 Mich. 318. That the plaintiff had promised to marry another person before she became engaged to the defendant is no defense: *Roper v. Clay*, 18 Mo. 383; S. C., 59 Am. Dec. 314. But the defendant may show in defense declarations made by the plaintiff, a few days after the breach, that she cared nothing for the defendant, that all she wanted was his money, that she only proposed to marry him to spite his family, that she had refused to live at his house, and did not propose to marry him and live with him at any residence he had, or where he was living. For such statements are expressive of feelings inconsistent with any purpose to fulfill the contract in spirit, and tend to show that she was not injured by the breach: *Miller v. Rosier*, 31 Mich. 475. And evidence of mutual rescission before the alleged breach is admissible under the general denial: *Shellenbarger v. Blake*, 67 Ind. 75.

EVIDENCE OF SEDUCTION IN ACTION FOR BREACH OF PROMISE.—This question is discussed in the note to *Weaver v. Bachert*, 44 Am. Dec. 178, where it is shown to be well settled that evidence of seduction is admissible in aggravation of damages. In addition to the cases there cited in support of this doctrine are the following: *Millington v. Loring*, L. R., 6 Q. B. Div., 190; S. C., 50 L. J. Q. B. 214; S. C., 43 L. T. 657; S. C., 29 Week. Rep. 257; *Berry v. La Costa*, L. R., 1 C. P., 331; S. C., 35 L. J. C. P. 191; S. C., 12 Jur., N. S., 568; S. C., 14 Week. Rep. 279; S. C., 1 H. & R. 291; *King v. Kersey*, 2 Ind. 402; *Haymond v. Saucer*, 84 Id. 8; *Hill v. Marpin*, 3 Mo. 323; *Roper v. Clay*, 18 Id. 383; S. C., 59 Am. Dec. 314; *Coll v. Wallace*, 24 N. J. L. 291; *Goodall v. Thurman*, 1 Head, 209; *Giese v. Schultz*, 53 Wis. 462.

DAMAGES IN ACTION FOR BREACH OF PROMISE.—In estimating the plaintiff's damages in an action for breach of promise of marriage, the jury may take into consideration the money value or worldly advantage of the marriage: *Royal v. Smith*, 40 Iowa, 615; *Lawrence v. Cooke*, 56 Me. 187; *Coolidge v. Neat*, 129 Mass. 146. In *Lawrence v. Cooke*, *supra*, it was held that an instruction that the plaintiff is entitled to such damages as will place her in as good a position financially as she would have occupied if the promise had been fulfilled was proper. But in *Miller v. Rosier*, 31 Mich. 475, an instruction to the same effect was held to be too complicated and conjectural. But the jury are not to be confined to mere pecuniary or worldly considerations. It is their duty to take into consideration the injury to the plaintiff's feelings, affections, and wounded pride, and the pain and mortification resulting from the breach of the contract: *Reed v. Clark*, 47 Cal. 194; *Royal v. Smith*, 40 Iowa, 615; *Coolidge v. Neat*, 129 Mass. 146; *Bennett v. Beam*, 42 Mich. 346; *Goodall v. Thurman*, 1 Head, 209; *Vanderpool v. Richardson*, 17 N. W. Rep. 936. The plaintiff is entitled to recover "not merely an indemnity for her pecuniary loss and the disappointment of her reasonable expectations of material and worldly advantages resulting from the intended marriage, but also a compensation for wounded feelings and the mortification and pain which she had wrongfully been made to undergo, and for the harm they had

been to her prospects in life." *Grant v. Willey*, 101 Mass. 356. The length of time during which the engagement continued may also be taken into account in awarding the damages. For this may be a very material fact in determining the effect of the breach upon the plaintiff's condition and prospects: *Lawrence v. Cooke*, 56 Me. 187; *Grant v. Willey*, 101 Mass. 356; *Coolidge v. Neat*, 129 Id. 146; *Vanderpool v. Richardson*, 17 N. W. Rep. 936. The plaintiff may prove her conduct and apparent distress on hearing of the defendant's marriage to another: *King v. Kersey*, 2 Ind. 402. And evidence that the defendant borrowed money of the plaintiff shortly before marrying another is competent, and may be considered by the jury in fixing the damages: *Simmons v. Simmons*, 8 Mich. 318. The damages are in the sound discretion of the jury, under the circumstances surrounding the case, and upon the facts proved: *Goodall v. Thurman*, 1 Head, 209. But the damages must be alleged and proved, otherwise but nominal damages can be proved, if objection be made at the proper time: *Glasscock v. Shell*, 57 Tex. 215. And the plaintiff's loss of health, if not alleged, is not a direct and proximate result of the breach, and is not admissible on the question of damages: *Bedell v. Powell*, 13 Barb. 183.

EXCESSIVE DAMAGES AS GROUND FOR SETTING ASIDE VERDICT.—A verdict will not be set aside on the ground that the damages are excessive, unless they are so excessive as to make a case of indubitable wrong, so clear and striking as to indicate prejudice, undue sympathy, or corruption: *Waters v. Bristol*, 26 Conn. 398; *Richmond v. Roberts*, 98 Ill. 472; *Haymond v. Saucer*, 84 Ind. 3; *Royal v. Smith*, 40 Iowa, 615; *Smith v. Woodfine*, 1 C. B., N. S., 660. In *Haymond v. Saucer*, *supra*, it was held that a verdict for two thousand dollars was not excessive; and in *Richmond v. Roberts*, *supra*, a verdict for four thousand dollars was held not to be so excessive as to warrant the setting of it aside, although there was no claim of seduction, and no attempt to injure the plaintiff's character, the defendant having always spoken of her in the highest terms after refusal. So in *Smith v. Woodfine*, *supra*, a verdict for three thousand pounds was held not to be excessive, the defendant having been shown to be worth one hundred thousand pounds. But in *Glasscock v. Shell*, 57 Tex. 215; S. C., 14 Rep. 669, it was decided that the plaintiff is entitled to compensatory damages only, where the breach of promise alleged was with no circumstances of aggravation, and a verdict for four thousand dollars damages was held to be excessive.

PECUNIARY CIRCUMSTANCES OF DEFENDANT may be considered by the jury in estimating the damages in an action for breach of promise of marriage: *Reed v. Clark*, 47 Cal. 194; *Hunter v. Hatfield*, 68 Ind. 416; *Lawrence v. Cooke*, 56 Me. 187; *Miller v. Rosier*, 31 Mich. 475; *Bennett v. Beam*, 42 Id. 346; S. C., 36 Am. Rep. 442; *Allen v. Baker*, 86 N. C. 91; S. C., 41 Am. Rep. 444; *Horam v. Humphreys*, Lofft. 80. In delivering the opinion of the court in *Allen v. Baker*, *supra*, Ruffin, J., discussing the question of the plaintiff's damages, said: "In estimating them, it is proper, according to the great weight of modern authority, that the jury should consider the pecuniary condition of the defendant as some standard by which to measure her disappointment and the extent of her loss." But evidence of the pecuniary condition of the defendant's father is not admissible: *Miller v. Rosier*, 31 Mich. 375. And in *Kniffen v. McConaell*, 30 N. Y. 285, it was held that the evidence of the pecuniary circumstances of the defendant must be confined to general reputation. And where the plaintiff's evidence tends to show that the defendant is a man of large wealth, he may prove in rebuttal that part of his property has been sold without his consent, after the suit was commenced, to satisfy a prior debt: *Sprague v. Craig*, 51 Ill. 288.

The plaintiff may, it seems, also show that she has no independent means: *Vanderpool v. Richardson*, 17 N. W. Rep. (Mich.) 936. In delivering the opinion of the court in that case, Cooley, J., said: "When the suit is for the loss of a marriage and of an expected home, the fact that the plaintiff is without the means to provide an independent home for herself is not entirely unimportant. It may be supposed to be one of the facts which both parties had in mind in making their arrangements, and it is not improper that the jury should know of it also and take it into account in making up their verdict."

AGGRAVATION OF DAMAGES.—The plaintiff may show circumstances of contumely and aggravation attending the breach of the contract, for the purpose of aggravating the damages: *Blackburn v. Mann*, 85 Ill. 222; *Chesley v. Chesley*, 10 N. H. 327; *Baldy v. Stratton*, 11 Pa. St. 316. Thus, attempts by the defendant to show misconduct of the plaintiff with other men may be considered by the jury in aggravation of the damages, if they are satisfied from the whole of the evidence that the charges are untrue and that they were made in bad faith: *Reed v. Clark*, 47 Cal. 194; *Lorence v. Cooke*, 56 Me. 187. And evidence that the defendant, after the breach, offered to procure a false certificate of marriage, and that he made unnecessary exposure of the plaintiff's infamy, is admissible in aggravation of the damages: *Baldy v. Stratton*, 11 Pa. St. 316. And where the defendant, knowing the charge to be false, attempts to prove that the plaintiff has been guilty of lewdness with other men, or with himself, such attempt will go to aggravate the damages, although not pleaded by him as a defense: *Kniven v. McConnell*, 30 N. Y. 285. A charge of fornication made by the defendant in the notice given with his plea, if it proves to be false, may be considered in aggravation: *Southard v. Rexford*, 6 Cow. 255. Calumnious allegations and imputations against the plaintiff's chastity made in the answer, if found to be false and made in bad faith, may be considered in aggravation of the damages: *Haymond v. Saucer*, 84 Ind. 3; *Denslow v. Van Horn*, 16 Iowa, 476; *Davis v. Slagle*, 27 Mo. 600; *Thorn v. Knapp*, 42 N. Y. 474; S. C., 1 Am. Rep. 561; *Leavitt v. Cutler*, 37 Wis. 46. And this does not prevent the defendant from setting up "as many defenses as he has:" *Haymond v. Saucer*, *supra*, modifying *Hunter v. Hatfield*, 68 Ind. 416, 420. The charge need not be known to the defendant to be false; it is enough if he had no sufficient reason to believe it to be true: *Leavitt v. Cutler*, *supra*.

But the defense that the plaintiff was unchaste does not, *per se*, aggravate the damages. It must be shown to have been made in bad faith from wanton or reckless motives: *Powers v. Wheatley*, 45 Cal. 113; *Denslow v. Van Horn*, 16 Iowa, 476; *Leavitt v. Cutler*, 37 Wis. 46. Charges of immorality made in the defendant's affidavit during the course of the trial, or in his original or first amended answer, are not to be considered in aggravation, where the trial is had on the second amended answer: *Leavitt v. Cutler*, *supra*. An attempt to prove that the plaintiff had had a bastard is not, if made in good faith, to be considered in aggravation: *White v. Thomas*, 12 Ohio St. 312. And neither is an allegation in the answer that the plaintiff used her best efforts to induce another to marry her while the plaintiff was waiting on her, if unsuccessful, to be treated as an aggravation: *Simpeon v. Black*, 27 Wis. 207.

Matters of aggravation after the commencement of the suit are not admissible. For in personal actions damages are allowable only up to the commencement of the suit: *Greenap v. Stoker*, 2 Gilm. 688; *Greenleaf v. McColley*, 14 N. H. 303.

MITIGATION OF DAMAGES.—The defendant may, in mitigation of the damages, prove any facts that show that his motives were not bad, and that his conduct was neither cruel nor malicious: *Thorn v. Knapp*, 42 N. Y. 474. So the defendant may, for that purpose, show that he was afflicted with an incurable disease at the time of the breach: *Sprague v. Craig*, 51 Ill. 288. Evidence drawn out by the plaintiff, of declarations by the defendant showing that his failure to keep his promise proceeded from no want of respect or affection, is competent to mitigate the damages: *Johnson v. Jenkins*, 24 N. Y. 252. And it seems that evidence is admissible in mitigation to show that the match was disapproved by the family of the defendant: *Johnson v. Jenkins, supra*; *Irving v. Greenwood*, 1 Car. & P. 350. But evidence of illicit intercourse between the parties before the promise is not admissible in mitigation: *Kesey v. Jones*, 1 Ala. Sel. Cas. 454. Neither are declarations of the plaintiff, made after the commencement of the action, that she had no affection for the defendant, and would not think of marrying him except for his money: *Miller v. Hayes*, 34 Iowa, 496.

ACTION FOR BREACH OF PROMISE ABATES ON DEATH OF DEFENDANT, and it cannot be revived against his personal representative unless there is some statute giving the right to revive it: *Stebbins v. Palmer*, 1 Pick. 71; S. C., 11 Am. Dec. 146; *Hayden v. Vreeland*, 37 N. J. L. 372; S. C., 18 Am. Rep. 723; *Wade v. Kallfleisch*, 58 N. Y. 282; S. C., 17 Am. Rep. 250; *Lattimore v. Simmons*, 13 Serg. & R. 183. It is not an action upon a contract within 2 N. Y. R. S. 113, secs. 2, 3, nor a wrong done to property rights or interests under 2 N. Y. R. S. 447, secs. 1, 2. It is essentially personal: *Wade v. Kallfleisch, supra*. But the death of the defendant does not abate an action for a breach of promise of marriage, under the statutes of North Carolina: *Allen v. Baker*, 86 N. C. 91; S. C., 41 Am. Rep. 444. An administrator cannot maintain an action for breach of promise made to his intestate, where no special damage is alleged: *Chamberlain v. Williamson*, 2 Man. & Sel. 408; nor will an action lie against an administrator of the promisor: *Grubb's Adm'r v. Sult*, 32 Gratt. 203; S. C., 34 Am. Rep. 765. An action for breach of promise abates by the marriage of the parties, and the attorney cannot continue it under the statute giving him a lien for his fees: *Harris v. Tyson*, 63 Ga. 629; S. C., 36 Am. Rep. 128.

CARR v. ESTILL.

[16 B. MONROE, 309.]

“**CHILDREN**” IS GENERALLY WORD OF PURCHASE, and not of limitation, in a will.

DEVISE TO WOMAN “AND HER CHILDREN,” SHE BEING UNMARRIED and having no children at the time, where she afterwards marries and has children, confers upon her, in Kentucky, an estate for life with remainder to her children; though it would confer an estate-tail in England.

APPEAL from Fayette circuit. The case appears from the opinion.

Robinson and Johnson, and C. D. Carr, for the appellants.
No brief for the appellee.

By Court, CREESHAW, J. Clifton R. Ferguson, on the twenty-eighth day of September, 1847, made a will, by which he devised "to Mary Baker Didlake and her children" a tract of land in the county of Fayette. At the time of this devise the devisee was unmarried and without children. She has since married and has one child; and her husband, Carr, having sold the land to Estill, and his wife being willing to unite with him in conveying the land, the question is presented whether Carr and wife can convey an absolute fee-simple estate in the land to the purchaser.

It is stated in Powell on Devises, 494, as a rule of construction in England, that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate-tail. By our law, an estate-tail is converted into a fee-simple, so that this rule of construction would give to Mary Baker Didlake an absolute fee in the land, and any children which she might thereafter have would be cut off, and could take no interest under the devise. This English rule of construction was adopted in order to effectuate the intention of the testator. For, as it is said, "the intent is manifest and certain that the children should take, and as immediate devisees they cannot take, because they are not in *rerum natura*; and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, and therefore such words shall be taken as words of limitation." Now, although the words abstractly and literally import an immediate gift, not only to the devisee *in esse*, but to his or her children also, yet if there be no children at the time, does it necessarily follow, as seems to have been supposed, that it was not the testator's intent that the children should take by way of remainder? We think not. But whatever may have been the legitimacy of such a conclusion in England, where in general more precision and particularity were observed in the creation of remainders than in this country, we are of opinion that with us it does not necessarily follow that because the words literally and abstractly import an immediate gift, it was not the intention of the testator to give a remainder interest to the children. In general, the word "children" is a word of purchase, and not of limitation, and as it was acknowledged by the jurists of England that the word, in its present connection, manifested a certain intent on the part of the testator that the children should take under the devise, and as they would do so there if the word were construed to be a word of limitation, and not a word of purchase, it was natural

and easy for the English judges to make an exception to the general acceptation of the words, and so construe it as to render the estate devised an estate-tail; and as this was a convenient mode of giving effect to the intention of the testator, the courts of England adopted it, without perhaps bestowing much consideration on the question whether the testator might not have intended to give a life estate to the person *in esse*, remainder to the children, which might equally have effectuated his intention.

However this may be, it is clear that they adopted their rule of construction to promote the intention of the testator. And our law having converted estates-tail into absolute fee-simple estates, it is equally clear that if we adopt the same rule of construction, the acknowledged intention will be frustrated and defeated, as the children could then take nothing under the devise. In order, therefore, to effectuate the acknowledged and manifest intent of the testator, it is obvious that a different rule of construction must be resorted to in this state.

It has been observed that the words of the devise, abstractly and literally, import an immediate gift, not only to the devisee in being, but to those not in being. But there being no children *in esse* at the time of the devise, it could not have been the intention to give an immediate estate to them, for that were impossible. And as the words of the devise, as conceded by all the authorities, manifest a clear intent that the children shall take, the only consistent and rational construction is that the testator intended the devisee in being at the time should take a life estate, remainder to the children. A slight change in the phraseology of the devise will manifest the propriety of this construction. Suppose the testator had used the words "to Mary Baker Didlake and the children she may bear," which was obviously his meaning, would it not be clear that, as there were no children in being at the time, and might not be at his death, he intended to vest an immediate estate in Mary Baker, and a future one in her children?

It necessarily results that as the children must take under the devise, if effect is given to the intent, and as it is impossible for them to do so *in presenti*, they must take *in futuro*. The reason of the English rule of construction failing in this state, the rule itself must fail, and the necessity is imposed upon us of resorting to a different rule of construction to carry out the intention of the testator. And the construction which we have given to the words of the devise is, as it appears to us, rational and natural. The mother, and also the children she might have,

being objects of the testator's bounty, and there being no children in esse at the time of the devise who could take jointly with the mother according to the literal import of the devise, we conclude that the intent was to give the mother a life estate, and the remainder to the children.

Wherefore the judgment is affirmed.

"CHILDREN" IS ALWAYS CONSTRUED WORD OF PURCHASE in a deed or will unless controlled by other words showing that it was intended as a word of limitation: *Kay v. Connor*, 49 Am. Dec. 690. In *Stonebreaker v. Zollinger*, 52 Md. 159, the principal case is cited to this point, and as an authority repudiating the doctrine of *Wild's Case*, 6 Co. 17. The principal case was distinguished, and the rule on this point held not applicable, in Indiana: See *Biggs v. McCarty*, 86 Ind. 357.

DEVISE TO ONE FOR LIFE AND TO HIS CHILDREN, EFFECT OF: See *Rogers v. Rogers*, 20 Am. Dec. 716; *Thompson v. Garwood*, 31 Id. 502.

COMMONWEALTH v. SHOUSE.

[16 B. MORRISON, 225.]

SALE CONSTITUTES BET ON ELECTION, and the parties are indictable therefore where the substance of the contract is that the property sold shall be paid for at a fair value, or more, in case a particular election shall result in a certain way, and shall not be paid for at all or shall be paid for at less or more than its value if the election shall result in a certain other way.

INDICTMENT FOR BETTING ON ELECTION OF PARTICULAR PERSON at a certain election is fatally defective if it does not show such person to have been a candidate, or to have been voted for, or in any way proposed to be chosen at such election.

APPEAL from Boyle circuit. There were three indictments against the defendant for betting on election of one Doneghy as sheriff at a certain election. Each of the alleged bets was charged to be in form a sale or purchase of certain articles, to be paid for when said Doneghy or his opponent should be elected. Demurrers to the indictments were allowed, and the commonwealth appealed.

J. Harlan, attorney general, for the commonwealth.

Bell and Fox, for the appellee.

By Court, MARSHALL, C. J. We have no doubt that a sale of property, to be paid for at its fair value, or at more than its fair value, in a certain event of a pending election, and not to be paid for at all, or to be paid for at more or less than its real value, as

understood between the parties, in a different event of the same election, is in substance a bet upon the result of the election; and any variation in the mere form of the transaction, or in the words describing it, will not change the substance of the thing, if it appear that the real effect is intended to be that one party may lose and the other may gain money or property, or the representative of either, according as an election may terminate for or against a particular person, or may result in one way or another. In any such case the transaction, in whatever form it may be clothed, is really a bet upon an election; and if the election be one authorized and protected by the laws, and of which the purity and freedom are of public interest and importance, the transaction, both on the ground of public policy and of statutory inhibition, is illegal, and has, by the statutes of this state, been generally made penal. But it is not a penal offense, under any statute, to bet that a certain individual will not be elected to a certain office at a certain election, unless he is a candidate for that office, or is voted for to fill it, or is intended or expected to be voted for, or is expected to be a candidate for it. It is not a statutory offense to bet that a man will not be a candidate for a particular office; and unless he be a candidate, or be voted for or proposed, it may not be an offense to bet either that he will or that he will not be elected. There must be an election taking place, or about to take place, in which he is or will be a candidate, or proposed in some way for the choice of the electors.

While, therefore, we are of opinion that each of these indictments states facts which may show that the defendant made a bet on the election or non-election of a certain individual to the office of sheriff of Boyle county, at the election of 1854, we are of opinion that it is defective in not stating that he was a candidate, or voted for, or in any manner proposed to the electors to be chosen for that office at that election.

Wherefore the judgment in each case is affirmed.

CONTRACT FOR PURCHASE OF LAND DOES NOT CONSTITUTE WAGER on the price of cotton, where the contract is to pay a certain sum for the land if cotton should rise to a certain price per pound by a specified time; otherwise, to pay a much smaller sum: *Ferguson v. Coleman*, 45 Am. Dec. 761.

GAMING, WHAT CONSTITUTES, GENERALLY: See *State v. Smith*, 33 Am. Dec. 132, and the note thereto discussing this subject.

BURCH v. BRECKINRIDGE.

[16 B. MORRISON, 422.]

WIFE'S SEPARATE ESTATE IS NOT SUCH TRUST ESTATE as is contemplated by the Kentucky statute of 1796 subjecting trust estates to the payment of debts.

WIFE CANNOT BIND SEPARATE ESTATE BY GENERAL PERSONAL ENGAGEMENTS not indicating any intent specifically to charge such estate.

WIFE MAY CHARGE SEPARATE ESTATE IN EQUITY IF SHE MANIFESTS INTENT to do so, but not otherwise.

NOTE OR BOND BY WIFE BINDS SEPARATE ESTATE, in Kentucky, though the estate is not referred to, the execution of such instruments being regarded as a sufficient manifestation of an intent to charge the estate.

WIFE'S SEPARATE REAL ESTATE CANNOT BE CHARGED BY VERRAL CONTRACTS on her part, but it is otherwise as to separate personal estate.

WIFE'S VERRAL CONTRACT DOES NOT BIND SEPARATE PERSONAL ESTATE unless made under circumstances showing an understanding between the parties that the separate estate should be liable, and in such case the charge will be limited to that part of the estate which it appears was intended to be made liable.

AGREEMENT BY WIFE'S TRUSTEE THAT SEPARATE ESTATE SHALL BE LIABLE for her debts is not sufficient, but it can be charged only by her own contract.

WIFE'S CONSENT TO CHARGE SEPARATE ESTATE with her debts may be inferred where she knew her creditors looked to it for payment, and continued to deal with them with such knowledge.

WIFE'S DEBTS FOR CURRENT EXPENSES ARE CHARGEABLE ONLY ON INCOME OF SEPARATE ESTATE, and not on the capital, even where an intent to charge the separate property is presumed, unless there is an express agreement to charge the principal of the estate; so, although the debts far exceed the income.

DEBT DUE FROM WIFE TO HER TRUSTEE WILL BE POSTPONED in order of payment, out of the income of her separate estate, to the debts due other creditors, where the trustee has been guilty of great indiscretion in creating debts against the estate exceeding its profits, under circumstances tending to mislead the *cestui que trust*.

WRITING IS NECESSARY TO CHARGE FUTURE PROFITS OF SEPARATE REAL ESTATE of a *feme covert* with her debts, because a disposition of such profits by anticipation is substantially a disposition of the *corpus* of the estate.

SERVICE OF PROCESS ON INFANTS IS UNNECESSARY WHERE THEY APPEAR and petition to be made parties, and a guardian *ad litem* is appointed for them.

APPEAL from a decree of Henderson circuit court upon a bill filed by Breckinridge as trustee of certain separate property of Elizabeth M. Burch, wife of Alexander M. Burch. The property consisted of certain slaves and other property, which belonged to the said Elizabeth before marriage, and was in 1841 conveyed by the said Alexander to one James K. Burch in trust

for his wife for life, remainder to the children of himself and wife. The trustee subsequently declined to continue to act, and Breckinridge was appointed by the circuit court of Fayette county his successor. Mrs. Burch having contracted a large number of debts for the support of her family, and Breckinridge having made considerable advancements to her, he filed this bill for the settlement of his accounts and the payment of Mrs. Burch's debts. A number of the creditors were made parties, as were also the children of Mrs. Burch at the instance of their father, as next friend. There was a decree removing the trustee and for the payment of the debts mentioned, and directing the sale, for that purpose, of Mrs. Burch's life estate in as many slaves as should be necessary, the purchaser to give bond to surrender the slaves on Mrs. Burch's death. Burch and wife and the children appealed.

James Harlan, for the appellants.

L. W. Powell, for the appellees.

By Court, Simpson, J. The act of 1796, subjecting estates held in trust to the payment of debts, has no application in a case of this kind. The deed vests in the wife a separate estate, which belongs to her, exclusive of her husband, and which in many respects is entirely dissimilar to other estates that are held in trust: *Sharp v. Wickliffe*, 8 Litt. 12.

As a general rule, a married woman cannot, according to the common law, contract as a *feme sole*, nor as such sue or be sued. That being the legal rule, courts of equity, acting in conformity with it, have held that the wife cannot bind herself personally, nor bind her separate estate, by her general personal engagements. If, therefore, the wife contracts debts generally without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a court of equity will not direct an application of such estate to be made for that purpose: 2 Roper on H. & W. 235; *Coleman v. Wooley's Ex'r*, 10 B. Mon. 320.

Courts of equity, however, as a consequence of the doctrine established by them that a married woman may have and enjoy separate estate, enable her to deal with it, and to alien or incumber it, when she shows an intention so to dispose of it; but that intention must be manifested by her, otherwise her separate estate will not be held liable. Its liability for her debts does not arise out of their creation merely, but out of an agreement by her, either express or implied, that it shall be liable for their payment

It has been held by this court that the execution by a *feme covert* of a bond or a promissory note, or the indorsement by her of a bill of exchange, should be regarded as a sufficient indication of her intention to charge her separate property with the payment of the debt. In such cases, although no reference be made to her separate estate, the execution of the security is deemed to be an implied agreement on her part that it shall be liable for the demand: *Jarman v. Wilkerson*, 7 B. Mon. 293; *Bell & Terry v. Kellar*, 13 Id. 384.

The extent to which her separate property may be subjected to the demands of creditors claiming under parol agreements has not been determined by this court. So far as the separate property consists of land, it cannot be made liable by a verbal contract. The wife cannot alien or dispose of her real estate except by a written agreement; and as a charge upon it for the payment of debts operates as a disposition of it *pro tanto*, it can only be created by a contract in writing: *Clark v. Miller*, 2 Atk. 379. But with respect to her other separate estate, consisting of personality and slaves, where she has verbally agreed that part of it shall be appropriated to the payment of a debt which she is about to create, there seems to be no good reason why this agreement should not be regarded as constituting a charge upon it. Where, however, a verbal agreement is made without any reference to her separate estate, then it will not be bound, unless the circumstances are sufficient to prove that, in fact, the understanding between her and the person with whom she has contracted was that it should be liable. But where there is no express agreement, and one arises only by implication, a court of equity will not allow such implied agreement to extend to any except that part of the estate which, it may be inferred from the circumstances, the wife intended to charge with the payment of the debt.

Now, applying these principles to the demands asserted in the present suit, and the right of the creditors to any relief is very questionable. No express agreement by the wife to charge her separate estate for the payment of these debts was either alleged or proved. The mere fact that they were contracted by her does not, as we have seen, render her separate estate liable for their payment. Were they, then, contracted under such circumstances as will justify the presumption that the contracting parties understood that they were to be a charge upon her separate property? The wife did not, when the debts were created, live apart from her husband, nor is it shown that he was insolv-

ent. The only circumstance from which it can be inferred that an understanding existed, both on her part and the part of the creditors, that the debts were to some extent to be a charge upon her separate estate, is, that the accounts were created in the name of the trustee, as may be presumed, with her knowledge and consent, inasmuch as she executed receipts to him for some debts which had been created in the same manner, and had been paid by him. The agreement of the trustee that her separate property should be liable for the debts cannot create any charge upon it. Her own contract is indispensably necessary for this purpose, and such a contract on her part can only be implied in this case from the fact that she knew her creditors looked to her separate property for the payment of their debts, and with this knowledge continued to deal with them, and permitted her trustee to pay the debts thus contracted by her out of her estate. On this ground we think her separate estate should be chargeable with the payment of these debts.

But the question still arises as to how far a court of equity will extend this implied agreement by her that her separate estate should be liable for the payment of these debts. They were all created merely for the current expenditures of the family; none of them arose out of a contract for the purchase of land or slaves, or for any property but such as would be consumed in the use. It cannot be presumed, in the absence of any express agreement to that effect, and without the execution of a security in writing, that she intended to create a charge on the principal of her estate, and subject it to sale for the payment of store accounts, and other current family expenditures. The only reasonable and legitimate presumption is, that she intended the profits of her estate to defray her current expenses, and a court of equity should not carry the implication against her to any greater extent. If parties deal with a married woman without any express contract in reference to her separate property, they have no reason to complain if, in furnishing her with articles for consumption merely, they are restricted to the profits of her estate, and are not permitted to subject the estate itself to sale for the payment of their demands.

It is true that in this case the defendant has been improvident, having in less than two years incurred a debt of some four thousand dollars, when the annual profits of her estate did not probably exceed some five or six hundred. But her trustee, instead of checking this improvidence on her part, seems rather to have encouraged it, by advancing her money, paying off her bills,

and taking receipts from her for the whole of it. From these acts of his she may have inferred that the profits of her estate received by him were sufficient to meet all these disbursements, as he only required her to execute receipts to him as her trustee, and never intimated to her that a sale of any part of her separate estate would be necessary for their payment. He clearly has no claim against any part of her estate except the profits. It cannot be presumed that by executing receipts to him for money she intended to charge any part of her estate but that which came into his hands as money. He could not, by the terms of the trust, convert any part of the trust estate into money except the profits. If any of the property itself were sold, the proceeds were, by the terms of the trust, to be reinvested, and the property purchased was to be subject to the same restrictions and limitations that the property sold had been subject to. The trustee, to put the most charitable construction on his conduct, acted with great indiscretion, and without a due regard to his duty, in creating a debt against his *cestui qui use*, exceeding very considerably the profits of her estate, and that in a manner which was calculated to induce her to believe that he had the money in his hands, and only wanted her receipts to show how it had been appropriated. Under these circumstances, it is equitable and just that the payment of his debt should be postponed, without interest, until the debts due to the other creditors be paid out of the hires of the wife's slaves.

No part of the wife's separate property, except the hire of the slaves, is to be subjected to the payment of any of the demands asserted in this suit. These hires must be first applied to the payment of such debts, excluding that due to the trustee, as was contracted by the wife, or by her order. For these debts no personal decree should be rendered against the wife, but the decree for their payment should be *in rem* against the profits of her estate, the land excepted. They should be paid ratably out of the annual profits until they are discharged, and then these profits should be applied to the payment of the debt due to the trustee. The profits of the land are not subjected, because a disposition of the anticipated profits of real estate is substantially a disposition of the estate itself, during the time that the profits are disposed of, and a contract to effect that object must be in writing. Besides, in creating an implied agreement on the part of the wife to charge the profits of her separate estate, it ought not to be presumed that she intended to divest herself entirely of all means of support; and for this reason, also, this implied agreement should not be extended to the profits of her real estate.

With respect to the errors assigned by the infants on the writ of error sued out by them, none of them seem to be available except the one relating to the merits of the decree. As they were made parties upon their own petition, they were in court, and the service of process upon them was unnecessary. A guardian *ad litem* was appointed for them by the court, and their answer was filed by him. If it had been proper to decree a sale of their mother's life estate in the slaves, their interest in remainder was as well guarded and secured by the decree as it could be, and they were not prejudiced by the omission to give day to show cause against it. But a sale of the life estate was more prejudicial to them than the annual hiring of the slaves would be, because their estate in remainder will be in less jeopardy, and be subjected to less hazard from the latter than it would be from the former mode of subjecting it to the payment of these debts. The purchaser of the life estate might remove the slaves to parts unknown, and he and his security in the bond which he was required to execute to have them forthcoming might both become insolvent before the expiration of the life estate. This hazard will not be incurred when the slaves are only hired by the year, so that the decree as rendered was prejudicial to the children as well as to their mother.

As the wife has the right to sell her estate for life in any of her separate property, she may do so, if she thinks proper, for the purpose of creating in that way a fund for the payment of these liabilities instead of having them discharged in the manner pointed out in this opinion.

Wherefore the decree is reversed upon the appeal taken by the husband and wife, and also upon the writ of error prosecuted by the children, and cause remanded with directions to ascertain what amount of the debts sued for were contracted by the wife, or by her order, and for further proceedings and decree in conformity with this opinion.

SEPARATE ESTATE, WIFE'S POWER OVER, AND LIABILITY OF, FOR HER DEBTS: See the notes to *Ewing v. Smith*, 5 Am. Dec. 557; *Thomas v. Fowell*, 30 Id. 220; *Harris v. Harris*, 53 Id. 399, discussing this subject; see also *Callahan v. Patterson*, 51 Id. 712; *Hollis v. Francois*, Id. 760; *Howard v. North*, Id. 769; *Bradford v. Greenway*, 52 Id. 203; *Womack v. Womack*, 58 Id. 119; *O'Neill v. Henderson*, 60 Id. 568, and cases cited in the notes thereto.

SERVICE OF PROCESS ON INFANT PARTIES, NECESSITY OF: See *Shaefer v. Gates*, 38 Am. Dec. 164.

APPEARANCE OF INFANTS, WHAT DOES OR DOES NOT CONSTITUTE: See *Valentine v. Cooley*, 33 Am. Dec. 166; *Shaefer v. Gates*, 38 Id. 164.

CARUTH v. THOMPSON.

[16 B. MONROE, 572.]

DELIVERY OF NOTE WITH BLANK INDORSEMENT VESTS RIGHT in the holder to collect it or negotiate it, or to fill up the indorsement with his own name as indorser.

BONA FIDE HOLDER FOR VALUE, OF NOTE INDORSED IN BLANK AND FRAUDULENTLY TRANSFERRED by a bailee, is entitled to hold the same against the true owner and to recover the amount thereof.

OWNER OF NOTE INDORSED IN BLANK, FRAUDULENTLY TRANSFERRED BY BAILEE, may maintain bill against the maker enjoining him from payment until it can be ascertained in whose hands it is, and requiring him to answer as to its whereabouts, and may, it seems, in a proper case, have judgment against him for the amount upon indemnifying him against another action.

APPEAL from a decree of Mercer circuit court, upon a petition filed by Caruth and others, and Thompson, Jones, Burks, and Vanarsdale, to recover certain notes executed by Burks and Vanarsdale, or the amount thereof. It appeared from the petition that Thompson & Brothers, being indebted to the plaintiffs, transferred certain notes held by them with their blank indorsement, including the notes now in controversy, to the plaintiffs' collecting agent. Without having filled out the indorsement, the agent redelivered the notes now in question to the defendant Thompson to have them secured, and they were, by the said Thompson, sold and delivered to Jones, defendant. The decree below was against the plaintiffs, and they appealed.

J. D. Hardin, for the appellants.

Trapnell and W. A. Hooe, for the appellees.

By Court, **SIRRIS, J.** Although the delivery of the notes, with a blank indorsement thereon, by Thompson to appellants' agent, may not of itself have vested them with the legal title thereto, it did invest them with a right to receive the amount thereof, to negotiate them, and with authority to complete the evidence of such legal title by filling up the blanks with a formal assignment to themselves: *Cope v. Daniel*, 9 Dana, 416.

The redelivery of the notes in contest by the agent, with the blanks still unfilled, to Thompson, the payee, or to any one else, had the same effect as to such person, and conferred the same right to negotiate, collect, or otherwise dispose of the notes: Story on Prom. Notes, 150; Bayley on Bills, 123, 124. It was not a full indorsement, mentioning the name of the party in whose favor it is made, and vesting him alone with power to

negotiate or collect the paper, but a blank transfer, enabling the holder to fill up to himself or pass the instrument to another by mere delivery.

One of the consequences resulting from this power to pass a bill or note with a blank indorsement by mere delivery is that if such bill or note be lost or stolen, or fraudulently misappropriated, any person who may become the holder of it in good faith, for value and without notice, is entitled to recover the amount thereof and hold the same against the rights of the true owner at the time of the loss or theft: Story on Prom. Notes, 148; Ch. Bills, 277; Story on Bills, 207.

The principle is founded upon necessity growing out of the peculiar character of notes and bills of exchange, constituting, as they do in an important degree, a circulating medium of commerce. The adoption of any other rule, or the application of the principle of *caveat emptor* to persons thus honestly acquiring such paper, would necessarily tend to impair confidence in that species of commercial securities, and diminish greatly its usefulness for purposes of trade.

Here Jones, who obtained the note from Thompson, the bailee of appellants, occupies, so far as the record speaks, the attitude of a purchaser in good faith, for a valuable consideration, and without notice of their rights. He is entitled, as such, to sue for and recover the note thus acquired, and the bill of appellants, as to him, was rightfully dismissed. They, and not an innocent purchaser, must suffer from the perfidy of their agent.

As to Burks and William H. Vanarsdale, the case should have been retained. Although the petition, as presented, did not authorize a judgment against them for the amount of their notes, it authorized the injunction prohibiting them from paying until it could be ascertained in whose hands they were. If the notes were in the hands of an innocent purchaser, or if they had paid them innocently to Thompson, of course appellants were not entitled to relief, but otherwise they were. They did not answer the petition, and, as the case stood, the chancellor should have required appellants so to amend their petition, by appropriate allegations, as to compel an answer from them as to the whereabouts or existence of the notes, or authorized a judgment for the amount, upon indemnifying them against another action therefor, or, upon their failure so to do, dismissed their petition without prejudice.

Wherefore, as to the appellees Jones and Cornelius Vanarsdale,

the judgment is affirmed; but it is reversed as to the other defendants, and cause remanded for further proceedings consistent herewith.

INDORSEMENT IN BLANK CONSTITUTES PARROT TRANSFER of a note, and will vest the right of action and all other rights in the transferee: See *Sterling v. Bender*, 44 Am. Dec. 539, and note 540.

BONA FIDE HOLDER FOR VALUE, WHO IS, AND RIGHTS OF: See *Stalker v. McDonald*, 40 Am. Dec. 389, note 406; *Russell v. Haddock*, 44 Id. 693, note 698; *Squier v. Stockton*, 52 Id. 583, and note 585.

BENTLEY v. BUSTARD.

[16 B. MONKES, 643.]

COMPLAINT AGAINST CARRIER NEED NOT NEGATIVE EXCEPTION IN BILL OF LADING against loss occasioned by "fire or dangers of the river," by alleging that the loss sued for was not so occasioned.

OMISSION IN COMPLAINT TO NEGATIVE EXCEPTION IN BILL OF LADING IS CURED, in an action against a carrier for loss of goods, where the plaintiff fails to aver that the loss was not occasioned by a peril within the exception, conceding that such averment is ever necessary, if the answer alleges as matter of defense that the loss was caused by a peril within the exception, and thus presents a distinct issue on that point.

JETTISON OF GOODS IS NO EXCUSE OR JUSTIFICATION FOR NON-DELIVERY, in an action by the shipper against the carrier, unless it was caused by unavoidable perils of the sea or dangers of the river, and made necessary by circumstances over which the carrier and his servants had no control and could not have foreseen and guarded against by the exercise of vigilance appropriate to the respective situations of such servants and to the nature of the navigation, and which circumstances left no reasonable means of preventing a total loss but by sacrificing part of the property to save the rest.

JETTISON OF PART OF CARGO TO SAVE RESIDUE IS NOT JUSTIFIED, THOUGH NECESSARY, and though it prove successful, if by due care, skill, diligence, and activity on the part of the carrier or his servants the crisis which made it necessary might have been avoided.

JETTISON MADE SOLELY TO PREVENT HARM TO VESSEL or to hasten the voyage, even though the danger and crisis could not be avoided, is unjustifiable, and furnishes no excuse for the non-delivery of the jettisoned goods.

CARRIER, EVEN UNDER EXCEPTION OF DANGERS OF RIVER, IS LIABLE FOR LOSS BY INCOMPETENCE or want of reasonable care, skill, and diligence of those whom he employs to navigate his vessel, as well as by insufficiency of the vessel or its equipments.

JETTISON, TO EXCUSE NON-DELIVERY OF GOODS, MUST HAVE BEEN NECESSITATED by the act of God or of public enemies, by the common law, or by perils of the sea or dangers of the river, when expressed in the contract.

"**PERILS OF SEA**" MEANS NATURAL ACCIDENTS peculiar to the sea which do not happen by human intervention, and are not to be prevented by human prudence.

JETTISON NEED NOT BE REQUIRED TO PRESERVE LIFE to render it justifiable. EXEMPTION OF "DANGERS OF RIVER" IN BILL OF LADING is analogous to the exception of "perils of the sea," and the principles applicable to both are substantially the same.

ACCIDENT OCCASIONED BY VESSEL RUNNING UPON KNOWN OBSTRUCTION is attributable to dangers of the river, or perils of the sea, as the case may be, if, in spite of reasonable care and skill, the vessel was driven there by the natural force of wind and tempest, but not otherwise.

ACCIDENT CAUSED BY VESSEL RUNNING UPON UNKNOWN OBSTRUCTION, without the fault of the navigators, at a place where vessels previously passed safely, is attributable to dangers of the river or perils of the sea.

UNKNOWN OBSTRUCTIONS TO NAVIGATION, to constitute such a danger of the river or peril of the sea as to excuse a carrier from liability for an accident caused thereby, are such obstructions as are not known to navigators generally, nor to those navigating the particular vessel, nor discoverable by them by reasonable vigilance in time to have avoided the accident.

ANSWER OF CARRIER MUST SHOW NECESSITY OF JETTISON, and that such necessity was caused by a peril within the exceptions in the bill of lading, where such jettison is relied on as a justification for non-delivery of goods, and it must state the facts constituting the necessity and peril, and not mere conclusions of law, as that the accident was caused by dangers of the river, or was unforeseen and unavoidable, or the like.

THAT JETTISON WAS DEEMED NECESSARY BY MASTER AND OFFICERS of vessel does not justify it, if it was not in fact necessary, but its propriety must be determined by the court and jury.

INADEQUACY OF CARRIER'S ANSWER IN NOT STATING FACTS JUSTIFYING JETTISON, relied on as a defense for the non-delivery of goods, will not preclude reversal of a judgment against the carriers for errors occurring at the trial, where the answer does allege, in general terms, that the jettison was caused by a danger of the river and by an unforeseen and unavoidable accident; that all available means of relief were used, and that the danger of total destruction was imminent, etc., where the answer was adjudged sufficient on demurrer, and the parties went to trial upon it, and the facts were fully disclosed in the evidence.

OPINIONS OF WITNESSES EXPERIENCED IN RIVER NAVIGATION as to whether or not the situation of a vessel which had run aground was such as to preclude any reasonable expectation or chance of relieving her by the use of spars and anchors, and to justify the master in not resorting to such means, are competent evidence in an action for loss of goods jettisoned to relieve a vessel so situated.

QUESTION IS FOR JURY WHETHER GROUNDED VESSEL COULD HAVE BEEN RELIEVED by the use of spars and anchors, and whether the failure to use them contributed to produce, continue, or increase the danger relied upon to excuse a jettison of goods.

EVIDENCE OF CONSULTATION BY MASTER AND OFFICERS BEFORE JETTISON of goods from a grounded vessel, and of opinions then expressed as to the condition of the vessel, the means of relief, and the necessity of the jettison, is competent but not conclusive evidence in an action for the

loss of the goods, and opinions so expressed may be proved either by the officers themselves or by persons present.

PILOT IS COMPETENT WITNESS FOR CARRIER, IN ACTION FOR LOSS OF GOODS JETTISONED FROM A GROUNDED VESSEL, WHERE JUSTIFICATION OF THE JETTISON IS CLAIMED.

APPEAL from the Jefferson circuit. The case is stated in the opinion.

William Atwood, W. Morris, and James Harlan, for the appellant.

Speed and Worthington, and B. Ballard, for the appellee.

By Court, MARSHALL, C. J. This action, by ordinary petition, was brought on the ninth of March, 1853, by E. Bustard against Bentley and others, as owners of the steamboat Glendy Burke, of which J. Bentley was captain or master, to recover damages for the non-delivery of a large quantity of molasses, in barrels and half-barrels, part of that which had been received by the boat at or near New Orleans, to be transported to and delivered at Louisville or Portland, the dangers of the river and fire only excepted. The bill of lading, containing the number and marks of the barrels and the contract for transportation, is referred to and filed with the petition, and is in the usual form, except that it has at the end, and above the signature, the following clause: "Not responsible for leakage or cooperage." The petition, however, alleges that the barrels, etc., delivered were not in as good condition as when received, by reason of which the plaintiff had been compelled to expend a named sum for hoops, etc., including which he claims as the balance due him, after deducting freight, the sum of four thousand one hundred and twenty-nine dollars, afterwards stated in an amendment to be four thousand one hundred and fourteen dollars and eighty-three cents, for which he claims judgment, etc.

The defendants demurred to the petition, and on the demurrer being overruled, moved that the demand for leakage and cooperage should be stricken from the petition, which was refused. The plaintiff moved for a judgment for the amount claimed, except for leakage and cooperage. These motions were overruled, and the defendants filed their answer, in which, besides denying their responsibility for loss by leakage and cooperage, they show that the non-delivery of the molasses, for which the plaintiff claims compensation (except that which was lost by leakage of the barrels delivered from want of proper cooperage), was caused by a jettison or throwing overboard of the barrels and half-bar-

rels not delivered, under circumstances in which it was deemed necessary, and ordered by the master, on consultation with the other officers concerned in navigating the boat, as the only means of saving her and the residue of the cargo, the aggregate value of which, with the freight, they say, was over ninety thousand dollars. And they aver that this loss was occasioned by the dangers of the river, for which they are not responsible by the bill of lading.

In excuse or justification of the jettison, they allege that the boat left New Orleans well officered and well manned, took on board on her way the plaintiff's cargo, and was duly prosecuting her voyage up the Mississippi for Louisville when, on the night of the fifth of February, and about five miles below Helena in Arkansas, being under way, she ran on Montezuma bar; that efforts were immediately made to back her off with the engines, and in doing so she swung broadside on the bar and stuck fast, and was there grounded; that she run on the upper end of the bar and swung with her side on it; that all means within the power of the defendants were used to get her off, but the bar was a quicksand bar, the river was falling rapidly, and the current and wind strong against the boat and the bar, pressing the boat upon the bar, and the night was very cold; that on account of the softness of the bar spars could not be used; that lighters of sufficient capacity to relieve the boat could not, so far as known, be procured, and the time necessary for procuring any would have exposed the boat and cargo to too much danger of loss; that in this condition the boat and cargo were in imminent danger of being lost, and the master, upon consultation, deliberately determined that the only alternative to save the boat and cargo was to resort to a jettison; that he then caused three hundred and thirty-eight barrels and two hundred and eighty-five half-barrels of molasses, and twenty-one barrels of oysters in the shell, to be thrown overboard, which so lightened the boat that with the use of the engines she was got afloat, and then proceeded on her voyage to Portland and Louisville, and delivered the remaining part of her cargo, two hundred and forty-four barrels and two hundred and seventy-four half-barrels of the plaintiff's molasses having been thrown overboard; and that the part of the cargo thrown overboard was the most convenient to reach, the least valuable, and the heaviest. And the answer states that the jettison was necessary to save the boat and the residue of the cargo; that the grounding was an unforeseen accident, inevitable and unavoidable, and happened without any

fault or negligence of the defendants or their agents; and that the loss of the molasses thrown overboard was caused by dangers of the river, for which, by the bill of lading, they are not liable, and that because of the jettison they could not deliver it.

The defendants further say, that if any loss occurred from leakage, of which they know nothing, it resulted from neglect of plaintiff's agents, on account of defective cooperage and barrels, without fault on their part; and they deny that the part delivered was not in as good condition as when received. In an amended answer, filed during the trial, they state that the barrels of molasses received on board of the Glendy Burke were in bad order, and had leaked very much when the jettison took place; that some of those thrown overboard were nearly empty, and that those thrown overboard had leaked and wasted at least — dollars. The objections of the plaintiff to the filing of this amendment were overruled; and to the opinion of the court overruling the objection, as well as to the other opinions before mentioned, exception was taken by the parties respectively.

The plaintiff demurred to the original answer, but the demurrer was overruled, and a jury impaneled, who, after hearing the evidence and being unable to agree on a verdict, were discharged, and the cause was continued. At a succeeding term a trial was had, which, after the exclusion by the court of all testimony going to show the opinions of various persons engaged in navigating steamboats on the Ohio and Mississippi rivers that spars and anchors could not have been used with any effect at the place and in the condition in which the boat was, and under instructions from the court that the plaintiff could not recover for damage by leakage and cooperage, and that the defendants had not made out the defense of a justifiable jettison, and that upon the whole evidence they must, as to the jettison, find for the plaintiff, resulted in a verdict for the plaintiff for three thousand eight hundred and fifty-seven dollars and forty-eight cents in damages, for which sum judgment was rendered in his favor. The defendants excepted to the opinions of the court excluding the evidence respecting the utility of attempting to use spars and anchors, and also to the instruction given as to the jettison. The plaintiff excepted to the instruction to find against his claim for loss by leakage and cooperage, and also to the opinion overruling his objection to the competency of Jamison, the pilot of the boat at the time of the jettison.

The motion of the defendants for a new trial, founded mainly upon the exclusion of the evidence above referred to, and upon

the instruction to find for the plaintiff as to the jettison, having been overruled, they have brought the case to this court, assigning errors covering all the decisions of the circuit court against them. The plaintiff has assigned cross-errors, questioning all of the decisions against him, except upon his motion for a judgment for all of his demand but that for leakage and cooperage.

Some of the questions thus presented are of minor importance. Others are of a magnitude not exceeded by any which can arise respecting the navigation of our great rivers, and the rights and duties of owners and masters of steamboats navigating them with freight. Those of the former class we shall barely notice, without enlarging upon them.

The defendants' motion to strike out so much of the petition as relates to the demand for loss by leakage and cooperage was properly overruled, because that part of the claim, and of the petition, involved the charge of deterioration of the barrels during the voyage, by the fault of the defendants. Besides, the object was afterwards fully answered by the instruction of the court on that subject. The plaintiff's motion for judgment, except as to leakage and cooperage, seems to have been made soon after the demurrer to the petition was overruled, and on the same day, and immediately before the filing of the answer, which removed all ground for it. The filing of the answer, though in the same order, is stated after the overruling of the plaintiff's motion. But if the answer was first filed, and if the motion had been granted, an inquiry as to damages would have been still necessary, and the effect of the motion was substantially attained by the instruction as to the defense of jettison. The amendment of the answer made during the trial does not appear to have been prejudicial to the plaintiff. The demurrer to the petition, which seems to have been founded upon its failure to aver that the loss for which damages are claimed was not occasioned "by fire or dangers of the river," was, as we are inclined to think, properly overruled, because the non-delivery of the cargo was *prima facie* a cause of action, and the matter of excuse or justification under the exception seems properly to come from the defendant, within whose knowledge it lies. If the plaintiff had negatived the application of the exception, it would have been a mere formality, which would not have thrown the burden of proof upon him, nor excused the defendant from showing, by pleading and proof, that the loss or non-delivery of the cargo was occasioned by one of the excepted causes. But if this were not so, and if the petition, standing alone, should have

been adjudged to be insufficient for want of a negative allegation that the non-delivery had not been occasioned by one of the excepted causes, we are satisfied that the defect was cured by the answer, which, professing to set out the cause and manner of the loss, avers that it was occasioned by one of the excepted causes, and thus makes a part of the issue the very fact which was omitted in the petition. And as that fact, being included in the issue, must have been determined one way or other as certainly as if it had been negatived in the petition, it would be worse than useless to send the case back for a formal negation by the plaintiff of a fact which was already embraced in the issue, and already and certainly negatived by the verdict. If, therefore, there be in such a case no error affecting the trial, and the verdict be sustained by the evidence, the court would not after verdict reverse the judgment for a defect of this kind, even though it might be fatal on demurrer; because, upon the whole record, the plaintiff would appear to be entitled to judgment.

We pass, then, to the answer, which not only admits the non-delivery of a large portion of the plaintiff's goods, as alleged in the petition, but avows, as the cause of non-delivery, that they were thrown into the river, and thus destroyed or lost, by the willful and deliberate act of the master and other agents of the defendants. But in order to make an act so obviously injurious to the shipper, and apparently so contrary to the undertaking and duty of the carrier, operative in itself as an excuse for the non-delivery, and a defense to the shipper's action for the apparent breach of contract, the act itself must be shown to have been caused by one of the dangers of the river which could not have been avoided, and to have been rendered necessary by circumstances over which the defendants and their agents and servants employed in the navigation of the boat had no control, which they could not have foreseen and guarded against by the exercise of that vigilance which was appropriate to their respective stations and called for by the character of the navigation in which they were engaged, and which, when they actually occurred, left no reasonable means of escaping a total loss but by sacrificing a part of the property at risk for the safety of the residue. If a power of such magnitude must be conceded to the navigators of steamboats in our interior streams, it furnishes a most potent reason why not only the boats themselves should be stanch, well equipped, and competent in every respect to meet all ordinary difficulties of the intended voyage, but why,

also, the masters or others at whose discretion a portion of the cargo intrusted to their care may be destroyed with impunity, or at the common charge of all concerned, should possess that skill and experience and care which would enable them, as far as practicable, to avoid or overcome danger, and that discretion and firmness which might prevent a sacrifice under the promptings of timidity or of needless despair.

The single fact that the boat is in such a situation at the time of a jettison as that in all reasonable probability a total loss of both vessel and cargo must ensue if immediate relief be not afforded, will not justify the carrier or his agents in resorting to the extreme measure of casting overboard, and thus destroying, a portion of the cargo, so as to throw the loss upon all who may be benefited by the sacrifice (though it be at the moment necessary and prove successful), unless the crisis come without fault, that is, without the want of due care in avoiding and due skill and diligence and exertion in overcoming the evil. If by the use of proper care and skill and diligence and exertion, or activity, the necessity for the sacrifice might have been avoided, or if, though the danger and the crisis could not have been avoided, the sacrifice is thought necessary, and is made only to prevent harm to the boat or to expedite her on her voyage, the carrier, on account of his fault in the first case, and because in the other he alone is benefited by the sacrifice, must alone bear the consequent loss.

The carrier, even under the exception of dangers of the river, is responsible to the shipper, not only for losses which occur by reason of the insufficiency of his boat or its equipments, but for those also which are occasioned by the incompetency of those whom he employs in its navigation, or by the want of reasonable care and skill and diligence in the particular circumstances which have occasioned the loss. And that reasonable competency, including care or prudence, and skill and diligence, is that degree of these qualities and experience which is usual among those employed in the same navigation, such as its nature and ordinary dangers and difficulties require, and which the public has, therefore, a right to expect from all who undertake the transportation of property and persons in that navigation.

By the common law, the common carrier, whether by land or water, and whether engaged in external or internal navigation, could excuse the non-delivery of the goods received for transportation only by showing that it had been occasioned by the

act of God, or by the king's (that is, public) enemies; against losses otherwise occasioned, unless by the fault of the shipper or owner of the goods, he was in effect an insurer. Under this rule of responsibility, a jettison, or the throwing overboard of a part of the goods, did not excuse the non-delivery, and therefore was not, as between the carrier and the shipper, justifiable unless it was done under a necessity occasioned by the act of God or of public enemies.

The right and law of jettison had its origin and growth as a law of the sea, in the navigation of which the loss of the vessel involved not only, in most instances, the loss of the cargo, but generally the loss, and always the hazard, more or less imminent, of life. And we sometimes find the rule exempting the carrier from liability on the ground of this right laid down as if depending upon or growing out of a necessity of throwing goods overboard for the preservation of the vessel and crew in a tempest: 2 Kent's Com. 603; or in extremity produced by other causes coming within the common-law exceptions to the undertaking of the carrier. The extreme rigor of the rule of liability applicable to carriers by sea, who necessarily incur much greater hazards than are ordinarily incident to transportation by land, has in modern times been mitigated by introducing into the contract for transportation and delivery the exception of dangers or perils of the sea, in addition to the two exceptions of the act of God and the king's (or public) enemies recognized by the common law. And as under the common-law exceptions the carrier was not liable for the non-delivery of goods thrown overboard under a necessity caused by the act of God or the public enemies, so to give him the reasonable benefit of the exception of the perils of the sea when expressed in the contract, he is not liable for the non-delivery of goods thrown overboard, under a necessity caused by a peril of the sea. In either case, and in the one as certainly as in the other, if the jettison be rendered necessary by one of the excepted causes, as by the act of God or a peril of the sea, the loss occasioned by the jettison is a loss occasioned by the cause which rendered the jettison necessary, and thus justified it, and is therefore a loss coming within the exception, and for which the carrier is not liable, except with all others concerned in proportion to the benefit derived from the sacrifice. But while it is generally easy to determine whether the loss has been occasioned by lightning, tempest, earthquake, or other act of God, it is often difficult, as said by Chancellor Kent, to determine whether the

disaster happened by a peril of the sea or unavoidable accident, or by the fault, negligence, or want of skill of the master: 3 Kent's Com. 217. "Perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence:" Id. 216.

It is more pertinent, however, and more profitable, to consider the examples given by which to determine whether the disaster has happened by a peril of the sea than to attempt any deduction from the expressions used in defining such a peril. "If," says the same author, "a rock or sand-bar be generally known, and the ship be not forced upon it by adverse winds or tempests, the loss is imputed to the fault of the master. But if the ship be forced upon such rock or shallow by winds or tempests, or if the bar was occasioned by a recent and sudden collection of sand in a place where ships could before sail with safety, the loss is to be attributed to a peril of the sea:" 3 Kent's Com. 217. The same rule of discrimination, and in the same words, is stated by Abbott, in his work on shipping, p. 258, also by Story on Bailments, and by other authors, who need not be referred to.

Under this rule, and from what has already been said, we must conclude that if a vessel transporting goods on the sea, under a contract containing the exception of perils of the sea, should, by running on a bar, such as is described in the last member of the rule, and in such a place come, without fault on the part of the navigators, into such a perilous condition as to render it necessary for the common safety that a part of the cargo should be thrown overboard, such jettison would be justifiable, and the carrier would not be held responsible upon his contract for the non-delivery of the goods thus destroyed. And although the necessity for preserving life is sometimes, it is not always, referred to in stating a proper case for a jettison, as in Abbott on Shipping, 142. But as property alone is destroyed by the jettison, it would seem to be sufficient in point of reason to justify the destruction of a small part of that which is at risk, that such sacrifice was necessary for the preservation of the residue of much greater value, though no life was at hazard, provided the necessity for the sacrifice has arisen without fault on the part of him who has charge of and is responsible for the whole. And we suppose the preservation of life has been referred to in connection with the necessity of a jettison, rather on account of the fact that the danger of the vessel com-

monly involved hazard to the lives of those on board, than as a serious indication that a jettison might not be justified unless it were necessary for the preservation of life as well as property. Surely the master would not be justified in abandoning the ship and cargo to a total loss merely because he and all on board could save themselves without difficulty, or were in no danger, when by the sacrifice of a small portion of the cargo the entire residue with the ship might be saved. The fact that the hazard of life to the crew and others is involved in the danger of the vessel would doubtless increase the importance of the crisis, and render more urgent the necessity of doing whatever might be done to insure the common safety. But we do not perceive that it should be absolutely essential to the justification of a jettison.

The exception of the dangers of the river in the bill of lading now before us bears a strong analogy, *mutatis mutandis*, to the exception of perils of the sea. And there seems to be no good reason why the same definition, with the substitution of "river" for "sea," should not be applied to each; nor why the same principle which determines the liability or non-liability of the carrier by water under the one exception should not also determine it under the other. The principle that the carrier should provide a vessel in strength and equipments suitable to the voyage which he undertakes, and that he should furnish her with officers and men competent in number and in the qualities requisite for the particular navigation, is alike applicable to both cases; and there can be no ground for discrimination upon the question of his liability for a loss occasioned by a want of reasonable care, or skill, or diligence in those whom he has employed as his agents in the transportation of merchandise. Nor should there be any as to his non-liability for accidents peculiar to the element on which his vessel is borne, and to the navigation he is engaged in, and which do not happen by the intervention of man, nor are to be prevented by human prudence. By which we understand that degree of prudence which is usually found in discreet men under similar circumstances, and is to be reasonably expected from those who are engaged in the particular navigation.

There are, it is true, differences between our rivers and the sea. But although these may produce a difference in the circumstances of the case, and some difference or even difficulty in the application of the same principle of liability or non-liability, we do not perceive that they should necessarily produce any

difference in the principle itself. It is said that there are maps and charts of the ocean by which the navigator is shown the course which he should pursue and the dangers which he is to avoid. But the new discoveries continually made, and the constant improvements and additions to existing charts, show that the great ocean is yet but imperfectly explored, while the numerous shipwrecks annually occurring show how little maps and charts avail against rocks and winds and storms, to which the navigation of the sea is subject. And what are maps and charts, even as guides upon the ocean, which must forever remain trackless, compared with the shores of our rivers, always in sight of the navigator, and with the successive objects upon them, soon becoming familiar, and which, as landmarks, enable him at a glance to know not only where he is, but what known obstacles or dangers he is approaching?

The narrowness of the rivers, too, while it facilitates his knowledge of the stream and its obstructions, or other difficulties, diminishes the danger which might otherwise arise from an accident produced by a peril of the river, and not involving the immediate destruction of the boat, by the facility which it furnishes, from the proximity of the shore, of removing persons and property to a place of safety. We find in the comparison thus far nothing which should relax in favor of the carrier upon the Mississippi and Ohio rivers the rule of diligence and skill, or the principle of liability, as established with respect to carriers by sea, under the exception by contract, of perils of the sea. And to pursue the parallel still further: if the rivers have currents, and are subject to winds and storms, which may counteract the efforts and skill of the helmsman and drive the boat from its course, and ground or strand her, so there are currents and tides in the ocean at least as strong, and winds and tempests much more powerful, occurring, too, when there is no port or shore, or anchorage at hand, which may afford protection. So if there are islands, and bars, and shoals, and snags in the rivers, there are also islands, and bars, and shoals, and rocks, open or concealed, in the ocean; and if there may be new formations of sand in the rivers, there may also be in the sea new formations, not only of sand, but of rocks thrown up by volcanoes, and which are either raised above or remain concealed beneath the surface of the water.

It is to these circumstances, as to which, so far as they may affect navigation, there is a considerable analogy between the rivers and the sea, that the rule quoted from Kent and Abbott

applies. The obstructions themselves may be considered as natural causes or facts, existing without the intervention of man, and peculiar to the element, whether sea or river. And although the obstruction be known, yet if, notwithstanding the exercise of reasonable care and skill, the vessel be driven upon it by extraordinary wind or tempest, or, as we add, by the current of the river, whose force and direction could not have been reasonably anticipated, nor its effects avoided by proper skill and exertion, all of which are natural forces; or if the obstruction be unknown and be at a place where vessels passed before in safety—the accident of the vessel in either case, running and grounding upon such obstruction, without fault of the navigators, is attributed to a peril of the sea, if the navigation be upon the sea, or should equally, as we think, be attributed to a danger of the river, if the navigation be upon it.

But if, on the other hand, the obstruction be known, and the vessel run upon it without being driven on it by the superior natural force of wind and tempest, the law of the sea makes the carrier liable for any loss occasioned by the accident, upon the assumption that, not being the result of the superior force of natural causes, it might have been prevented by human prudence, that is, by the exercise of reasonable care and skill, and is to be attributed, not to a peril of the sea, but to the fault or deficiency of the navigator. And to the application to the carrier on the river, of this branch of the rule, with the qualification of adding the current of the river as one of the natural forces which might, by counteracting the reasonable exertions of care and skill on the part of the navigator, and without fault on his part, produce the accident, there can, in our opinion, be no reasonable objection, unless the carrier on the river is to be absolved from the exercise of reasonable care and skill. We think the carrier is to be held liable for every loss occasioned by an accident, which, by the use of reasonable care and skill and prudence by the navigator of his vessel might have been prevented. And, therefore, we have, in our exposition of that branch of the rule which excuses the carrier, for the vessel being driven by winds, etc., upon a known obstruction, expressed the qualification necessarily to be understood in the rule itself as quoted, that the accident must occur notwithstanding the exercise of reasonable care and skill to prevent it.

It will be observed that we have included among the obstructions which may aid in causing an accident attributable to dangers of the river, not only islands, and bars or shoals, but also

snags, and we might say, the shore itself. The principle being that if the boat, while pursuing the usual course or channel, runs and grounds upon one of these obstructions, which is unknown to navigators, the accident is attributed to a danger of the river; but if it run upon one which is known, it is not attributed to that cause unless it be driven upon it by one of the natural forces to which we have referred, and notwithstanding the reasonable efforts of the navigator. The same principle of discrimination between the known and the unknown applies to the shifting of bars, or the formation of new ones by the rising and falling of the river. But as this property or habit of the river, as well as its ordinary currents and the effect of ordinary winds, should be known, and must be presumed to be known, to the navigator, a corresponding degree of caution is requisite in approaching and passing those places in which such changes may be expected in the bed of a falling river, and in which the course of the boat may be effected, even by ordinary winds and currents.

We have only to add upon this subject, that in speaking of unknown obstructions we refer to such as were neither known to navigators generally, nor to the navigators of the particular boat before the accident, nor discoverable by them by the exercise of reasonable vigilance on their part, and in time to have avoided the accident. If the obstruction be thus unknown, the accident of running upon it may properly be regarded as one which could not have been prevented by human prudence or foresight. But if it be actually known to the navigator of the boat, or if, being generally known, he ought to have known it, or if he might have known it by the use of reasonable vigilance, then, unless the boat be driven upon it by superior natural force against his proper exertions, it is not such an accident as human prudence and foresight could not have prevented, and is therefore not attributable to a danger of the river. The same principle may be applied with regard to winds and currents, with a discrimination between what is ordinary, and should be known and provided against, and that which is extraordinary, and not to be anticipated. The conclusion to which we have come in reference to this exception of dangers of the river, and to the criterion of the carrier's liability, though opposed in some degree to the case of *Collier v. Valentine*, 11 Mo. 299, is accordant with the general current of cases cited upon this subject by the counsel for the carrier, and especially with the cases of *Brown v. Wright*, 4 Yerg. 57; *Shute v. Wade*, 5 Id. 7; and *Hackney v. Williams*, 6 Id. 340, as quoted by him.

It was necessary that the answer which admitted and professed to justify the non-delivery of a large portion of the plaintiff's goods, and to present a defense under the exception of dangers of the river, should state facts which would show, not only a necessity for throwing the goods overboard when it was done, but also that this necessity was caused by a danger, or by dangers of the river.

The allegation that the accident and loss were occasioned by dangers of the river is an allegation of a conclusion of law arising upon certain facts, and the facts themselves should have been stated. The averment that the accident was unforeseen, and inevitable or unavoidable, presents no distinct fact. These terms are themselves but conclusions from facts which should have been stated. The fact or facts which prevented the danger from being foreseen, and those which made it unavoidable and rendered it inevitable, should have been shown with reasonable precision and brevity; for we are not requiring a statement of the evidence by which the facts may be proved, but a statement of the material facts on which depend the conclusions of law relied on in the defense. An accident may have been unforeseen, and may, under the particular circumstances, have been at the moment unavoidable and inevitable, and yet may not be properly attributable to dangers of the river; and it will not be attributed to that cause if, by the exercise of reasonable care and skill, it might have been foreseen and avoided.

The boat, in ascending the Mississippi in the night, ran on Montezuma bar. Without drawing any inference of notoriety from the fact that the bar had a name, it is evident, from what has been said, that the running upon it was not an accident attributable to a danger of the river, unless the bar, being a new formation or in a new place, was unknown (in the sense in which we have explained that term), and was not visible nor discoverable by reasonable vigilance in time to be avoided; or unless, although it was known or thus discoverable, the boat was, without fault of the navigators, driven upon it by the wind or the current, which counteracted the reasonable exertions of those who were conducting it. The operation of these natural forces in producing the collision seems to be absolutely negatived by the fact that the boat was going up stream when she struck the bar, while not only the current, but the wind also, as alleged, were driving in the opposite direction. The striking or running on the bar which thus occurred in going up stream may be assumed to have been caused by the power of the engine

and the force of steam, presumably under the control of those on board. It was therefore necessary, in order to bring that collision within the exception of dangers of the rivers, to show that the bar was a new formation, where boats had before passed in safety, not generally known, and not known to those having the direction of this boat.

Again: as the boat ran upon the bar in her ascending progress, the presumption is that she ran upon it with her bow up stream; and in that position, the engine being reversed to back her off, she would, when got afloat, be naturally and rapidly impelled stern foremost down the stream, by the concurrent forces of the wind, the current, and the engine. And yet in pursuing the narrative of the disaster, as presented in the answer, we find it said that in endeavoring to back her off with the engine the boat swung broadside upon the bar, stuck fast, and was then grounded. All this was certainly strange and inexplicable, if it happened while her bow was still aground on the bar, which it must have struck on the lower side, and while the boat was operated on by the current and wind and steam, all tending to keep her in a direction up and down the channel. But the answer says she ran on the upper end of the bar, and swung with her side on it, the wind and current pressing her on the bar. Of course this could not have happened, either while the bow was fast where it first struck, and the stern down the stream, or while the boat was actually moving up stream, bow foremost. It must have happened after she was got afloat from the first sticking, and while going down the stream before the engine was reversed, or before it had given her a new headway up the stream; and while thus descending her stern may have struck on the upper side of some other part of the same or of another bar, and her bow swinging round by force of the wind and current bearing it downward. She may thus have been found broadside upon the bar.

This, according to the evidence, was substantially the actual course of events. There seems to have been in fact, as from the answer there may be inferred to have been, two collisions or accidents: the first while the boat was ascending the stream, when probably the bow ran upon a bar; the other after she had been got afloat from the first striking, and before recovering her headway, when descending the stream stern foremost she struck another bar, or a different part of the same, and having swung round came into the position in which the jettison was resorted to, and, as alleged, under a necessity then existing to throw a

part of the cargo overboard as the only practicable means of saving the residue and the boat itself. But in order to show that this necessity, if it existed, and the consequent loss and non-delivery, were occasioned by dangers of the river, and therefore within the exception in the policy, it was necessary to show, not only that the extreme peril of the boat was the unavoidable consequence of this second striking, and of the action of the wind and current on the boat, not to be averted by reasonable skill and exertion, but that the second striking itself was upon a recent formation, or unknown bar; or that it was caused by force of the wind and current, and in either case without fault on the part of the navigators. And if the situation of the boat which rendered her liable to an accident not consistent with her proper motion up stream, and which, therefore, should be accounted for, was the consequence of the first striking, it should have been shown that reasonable care and skill and exertion were used in getting the boat off from the first striking, and in avoiding the second as well as that of the first striking, was itself caused by danger of the river. And if the part of the river where these accidents occurred was, on account of the number or extent and shifting character of the bars, particularly intricate and dangerous, this fact, instead of authorizing a relaxation, required an increase of care and skill and diligence. And finally, if the second striking and the grounding of the boat with her broadside on the bar, where the wind and current were pressing her upon it, be accounted for and traced to dangers of the river which could not have been prevented by human foresight, it would still be necessary to show what particular fact or circumstance beyond the control of the navigators caused to the boat, in the condition described, such imminent danger of immediate destruction as rendered it necessary for the safety of boat and cargo that a part of the latter should be thrown overboard. And it should be shown that before this extreme measure was resorted to all other practicable means were tried; or if any usual means were omitted, the cause of such omission should be stated.

The answer, when subjected to these tests, growing out of the principles which we deem applicable to the subject, is found to be substantially defective in failing to state facts which authorize the conclusion that either the first or the second striking of the boat was attributable to a danger to the river, and not to the fault of the navigators, and in failing to state the facts which constituted or caused the immediate and imminent danger to

the boat and cargo, to be avoided only by a jettison, and which, while they forbade delay, which in many cases might bring relief, prevented the resort to other means of safety rather than to the sacrifice of a valuable part of the cargo. The manner of determining on and making the jettison as stated seems to be subject to no reasonable objection. But the fact that the master and the officers whom he consulted thought the jettison necessary did not make, and do not conclusively prove it to have been so; and as the propriety of their decision and conduct must be passed upon by a court and jury, to whom the questions as to the cause of the loss and the liability of the carriers are to be submitted, it is necessary that the facts relied on to justify their acts and to repel the liability should be presented in pleading to the court, which is to pass upon their sufficiency, as well as in evidence to the jury, which is to pass upon their truth. It may be, indeed, that the carrier may apprehend some disadvantage in submitting to tribunals deliberating in ease and security, the decision upon facts and conduct occurring in the midst of dangers and difficulties, to be fully estimated by those only who encounter them. But the apparent severity of this ordeal is mitigated by the consideration that the law, while it does not countenance or justify rashness or inordinate timidity in those who undertake the affairs of others, yet requires from them, by implication, nothing more in judgment or action than that which under the circumstances is reasonable, and may be justly expected from men of ordinary prudence and qualification for the undertaking, and that by confiding the ultimate decision of the facts to a tribunal composed of ordinary men, and by admitting all such pertinent testimony as may elucidate the conduct and motives of those concerned, it insures the application of this humane and reasonable principle in the trial of the questions which are to be decided. If, when a fatal accident occurs, the main circumstances exist which may characterize the loss as attributable to a danger of the river, if produced without fault or negligence, the court pronouncing the law must inform the jury that reasonable care and skill and exertion is all that is required from the navigators; and there is little danger that the jury will subject their judgment or conduct in a crisis of danger to an unreasonable test, or require from them more than under the circumstances should be expected from ordinary men professing the skill and discretion appropriate to their station and business.

But although the answer is deemed insufficient, because it

does not state the particular facts which are essential to the justification relied on, yet as it does state that the loss was caused by a danger of the river, and by an accident unforeseen, unavoidable, and inevitable—that all available means were used for the relief of the boat, showing why some particular measures were unavailable and not resorted to, and that the danger of total destruction was so imminent and immediate as to render the jettison necessary for the common safety—and as these general statements, which did in fact include the facts which should have been stated, were adjudged to be sufficient on the demurrer, whereby the defendants were prevented from making amendments which they might have made if the demurrer had been sustained; and as, under the opinion of the court overruling the demurrer, the parties went to trial as upon a valid issue; and as the answer, though defective for want of particular statement, covered in fact the whole case, and was so considered and treated on the trial; and as the evidence introduced by the defendants, and that which was offered and rejected, conduced to prove facts on which the jury might have found a verdict for the defendants, and the judgment thereon would not have been reversed because the answer did not state facts which, being included in its general statements, and therefore in the issue, must have been proved to authorize the verdict, and should have been considered as established by it—we are of opinion that they should not be precluded, by the insufficiency of their answer, from questioning the judgment against them, on the ground of errors in the trial which may have prevented a verdict in their favor, or from reversing the judgment, if there were such errors. As the answer, although insufficient on demurrer, would have sustained a judgment for the defendants if the verdict had been in their favor, its insufficiency is not such as to justify an affirmance of the judgment against them on that ground alone.

We therefore proceed to inquire into the alleged errors prejudicial to the defendants committed during the progress of the trial. The principal and most important of these alleged errors consists in the rejection by the court, in the various forms in which it was presented, of all evidence offered by the defendants which tended to prove, by the opinions of witnesses experienced in the navigation of steamboats on the Ohio and Mississippi rivers, that spars and anchors could not have been used, with any practical advantage, towards the relief of the boat, in consequence of the softness of the bar or sand on

which the boat was grounded broadside. It is not shown that any attempt was in fact made to use spars or anchors for the purpose of getting the boat free from the bar; and it is suggested that the evidence of opinion was rejected because the attempt to use them was deemed to be the essential and exclusive test of their practical utility, and that this test not having been resorted to, or even attempted, the court was of opinion that the failure could not be justified nor the actual experiment substituted by mere general evidence of opinion, and that spars and anchors being the usual means of relieving a boat when aground, the failure to attempt their use in this case was such a neglect as of itself to prove the absence of that care, or skill and diligence, or exertion which the occasion required, and which were necessary to a justification of the jettison.

But while the law requires the use of all practicable means of relieving the boat from distress before resorting to a jettison, we know of no rule which makes the use of any particular means indispensable; and if, in point of fact, the nature of the bar was such that spars and anchors could not be used at all; or if the situation of the boat and the circumstances existing at the time were such that spars and anchors, if they might be used at all, could not be used with any prospect or hope of relief, or of material or timely benefit, we know of no principle or rule of law which requires that fatigue and exhaustion and exposure should be incurred for the mere name of diligence in making an attempt which reason and experience determine to be hopeless and useless. The modes of using spars and anchors as means of relieving boats when aground, the practicability of using them in particular places of a peculiar character, and their general effect on that which may be expected from them under various circumstances, are matters of skill and experience belonging to the particular art, as to which those who have skill and experience in the subject may, according to the general principles of evidence, express their opinions, either upon facts known to and stated by themselves, or upon facts hypothetically stated to them and proved in the cause by other witnesses.

But at last these opinions, to have any value, must rest upon facts, to be proved as facts, and not as mere matters of opinion. Upon the question whether spars and anchors could be used at all at the place where the boat was aground, the principal fact upon which opinion might be founded relates to the nature of the bottom, and of the bar or sand at that place, as being of such rarity or density that anchors could or could not

take hold upon the surface, and that spars could or could not find a foundation or resting-place within the proper distance from the application of the power. The fact as to the density of the sand of which the bar was composed might be imperfectly or inferentially proved by those who had a general knowledge of it from previous experience.

But this general inference, or even knowledge, would hardly account for or excuse the entire neglect of spars and anchors without making some actual test, if opportunity allowed, of the precise nature or condition of the sand composing the bar on which the boat was aground, in order to ascertain whether spars and anchors, or either of them, could be used. The nature of the bar being proved, the question whether spars and anchors could be used at all or not would scarcely require the skill of an expert for its solution. But the question whether, if the nature of the bar presented no absolute hinderance to their use, the situation of the boat was such as precluded all reasonable expectation or chance of relief by that means, is a much more complicated and difficult question, requiring not only a knowledge or detail of the existing circumstances, but a large share of skill and experience in the management of boats, and in the means of relieving them. And as the opinions of persons possessed of this skill and experience would often furnish the only means by which ordinary men, unskilled in the particular subject, could come to a just or satisfactory decision, the necessary alternative seems to be, either that no circumstances can excuse the failure to attempt the use of spars and anchors, where there is a possibility of making the attempt, however hopeless it may be, or that the carrier must be allowed to prove, in the only manner in which it can be proved without actual experiment, that the attempt would have been hopeless and useless.

It has already been said that the law requires nothing more than reasonable—that is, suitable—skill and care and exertion. It does not expect or require that the navigators of the particular boat which has met with loss should possess or display extraordinary, much less superhuman, faculties. It does not hold them or their employers liable for their omitting to do what other persons of skill and discretion, in the same employment, would not, under like circumstances, have done or attempted. As all or each set of navigators must act upon their own judgment of what, under the actual circumstances, is useful or practicable, so the common judgment or opinion of men of compe-

tent skill and discretion in the art or profession seems to be the appropriate and peculiar test of that which is reasonable, and of that which should be required of each. And as these opinions are subject to the ultimate judgment of the jury or other triers, as well with respect to their own reasonableness as with respect to the competency and impartiality of those who deliver them, there would seem to be less danger that the jury would be led into mistake when aided by the enlightened opinions of skillful men than if left to their own judgment upon the mere facts of the case.

The real question in this branch of the case is whether spars or anchors could have been used with any effect towards the relief of the boat in her actual situation, or whether the failure to use them contributed in any degree to produce or continue or increase the danger which was the ground of the jettison and of the consequent loss. And this question is one, not of law, but of fact, to be decided by a jury, upon such evidence of facts and opinions as, according to the general principles of evidence, is appropriate to such a question involving the exercise of judgment and skill, and which can only occur in a particular employment or business of art. And as it is understood to be the duty of the master, before making a jettison, to consult the other officers on board, if there is opportunity for so doing, we think the carrier, on the question of his liability for the loss, is entitled to the benefit of the fact that such consultation was had, and also of the opinions there entertained and expressed by the officers in charge of the boat, to be proved by those who expressed them, if their evidence is attainable; and if not, by others who were present or had knowledge of them. But this evidence should be admitted no further than to prove the judgment or opinion of the individuals referred to, as expressed at the time, with reference to the actual condition of the boat and the probable or possible means of relief. And even to this extent it would be admissible to prove only that the jettison was made deliberately, and upon consultation and advice in reference to the actual circumstances and necessities of the case, as understood by those who were best acquainted with them and were bound to act.

It may indeed be doubted whether these opinions, on which, as expressed at the time, the jettison was made, were not a part of the *res gestae*, and provable as such by the testimony of those who heard them. But be this as it may, they are certainly not conclusive, either as to the condition of the boat or the possible

means of relief, or the propriety or necessity of the jettison at the time. And they are inadmissible as to the manner in which the boat was placed or brought into the situation in which the jettison was thought necessary.

The court having excluded testimony which, according to the foregoing opinion, was admissible, and upon which, in connection with the evidence before them, the jury might have found a different verdict, the judgment ought to be reversed and a new trial had, unless this court should assume conclusively, which it cannot properly do, that the non-delivery of the plaintiff's goods was caused by the fault of the defendants or their agents, and not by a danger of the river and an accident occasioned thereby, which could not have been foreseen or avoided.

Upon the cross-errors, so far as not already disposed of, we remark that there is no foundation in the record for the complaint that the court improperly overruled the plaintiff's motion for judgment (on the answer of the defendants held good on demurrer) for the amount to which he would be entitled upon a settlement of the general average, in case the jettison, as alleged in the answer, was rendered necessary by a danger of the river, and which it is contended the master was bound to ascertain and secure. The record does not state that any such motion was overruled or even made. And if the motion had been expressly made and overruled, we are far from being satisfied that in an action in which the plaintiff claims damages for non-delivery of goods according to the bill of lading, judgment could be claimed upon an entirely different liability, which might grow out of facts presented in the answer, as a bar to the actual demand. We have, therefore, deemed it unnecessary to inquire, and certainly unnecessary to decide, whether, in a case of justifiable jettison, constituting a justification for non-delivery of the plaintiff's goods, the master is bound to ascertain and secure the amount due to the plaintiff as a general average, and the carrier is liable for a neglect of this duty. Some allegation of the breach of this duty, if it be one, would seem to have been necessary to fix the liability; and as it was not essential to the answer, as about the present action, that it should show that the master had done anything in relation to the general average, its silence on that subject could not possibly form the basis of a judgment for the plaintiff's share.

A more serious question is presented by the complaint that the court improperly overruled the plaintiff's objection to the competency and admissibility of R. Jamison, the pilot who had

charge of the boat when she first struck, and when in backing off she was finally grounded, and who was allowed to testify as a witness in this case without a release.

This objection is founded upon the rule laid down in the books on evidence, and established by numerous adjudged cases, that in an action against the principal for damage occasioned by the neglect or misconduct of his agent or servant, the latter is not a competent witness for the defendant without a release: *Greenl. Ev.*, sec. 394; and the reason is thus stated by the author referred to: "For he is in general liable over to his master or employer, in a subsequent action, to refund the amount of damages which the latter may have paid." And of the amount of damages recovered against the employer, the record will be evidence against the agent, though he may not have been required to defend the action. This rule is said, in the section quoted, to apply to the relation of master and servant wherever, in its broadest sense, it may be found to exist; and among other cases stated is the case of a pilot, in an action against the captain and owner of a vessel for mismanagement while the pilot was in charge; or to a ship-master, in an action by his owner against underwriters, where the question was whether there had been a deviation, neither of whom, says the author, is competent to give testimony, the direct legal effect of which will be to place himself in a situation of entire security against a subsequent action.

In this case a judgment of damages against the defendants would not be evidence, for any purpose, against the pilot, in a subsequent action by his employer, because the judgment and damages might be founded wholly upon the impropriety of the jettison as being unnecessary, whether there had or not been any neglect or misconduct in the pilot's management of the boat. This ground of objection to his competency has, therefore, no application to this case. And although a verdict for the defendants might secure him from responsibility to them for the present loss to the shipper, it does not necessarily follow that it would secure him from responsibility to them for any injury they may have sustained, independently of the jettison, by his negligence or misconduct in some stage of the same disaster. Nor is it certain that the same standard of skill would be applied in an action by the carrier against the pilot as in an action by the shipper against the carrier, who may have employed a pilot known to possess less than ordinary or proper skill. For these reasons, and because in most cases of disaster

in the night, as in the present case, the pilot at the wheel, and necessarily on the lookout, may be presumed to be the only person who knows with accuracy the causes by which it was produced, we think the court did not err in deciding that the witness was competent, however the objections might go to his credit.

With respect to the defective cooperage, and the leakage complained of, we concur with the circuit court in the opinion that on the evidence in this record the plaintiff had no right to recover anything on this account, because the defect existed when the barrels were received, with an express condition of non-liability therefor; and it does not appear that the defect and consequent loss was increased by any fault of the defendants or their agents. But on this subject we go still further, being of opinion that so far as at the time of the jettison the barrels and half-barrels thrown overboard had, without fault of the defendants, lost their proper guarantees, the defendants, even though the jettison be found not to be fully justified, and not a bar to the action of non-delivery of the barrels thrown overboard, are still entitled to a deduction on account of the loss in quantity from the barrels thrown overboard by reason of the leakage from them, which, without their fault, had occurred before the jettison; which deduction, though it may not be precisely ascertainable, should be made by the jury upon such *data* as the evidence may furnish, and should go in diminution of the damages.

Wherefore the judgment is reversed, and the cause remanded for a new trial according to the principles of this opinion, as preparatory to which the defendants may amend their answer.

JETTISON OF GOODS, WHEN JUSTIFIABLE: See *Van Horn v. Taylor*, 41 Am. Dec. 283, note, containing discussion of the subject, and collecting other cases.

"DANGERS OF RIVER," "PERILS OF SEA," ETC., WHAT ARE WITHIN: See *Van Horn v. Taylor*, 41 Am. Dec. 279, and note 281, defining and discussing this question; *Whitesides v. Thurlkill*, 51 Id. 128.

THE PRINCIPAL CASE IS CITED in *Cottle v. Cole*, 20 Iowa, 483, to the point that a denial in an answer must be of facts, and not of conclusions of law.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

BLACK v. CARROLLTON RAILROAD Co.

[10 LOUISIANA ANNUAL, 33.]

RAILROAD COMPANY IS LIABLE FOR INJURY caused by the negligence of its servants.

IN ESTIMATING DAMAGES SUSTAINED BY FATHER from INJURY to his infant son, the jury may take into consideration the expense of medical attendance, the loss to the father through neglect of business during his son's illness, and the loss likely to arise to the father from the son's crippled state during the period when he would be able to provide for his own support or assist his father; but the jury cannot consider the mental anguish or suffering which the injury caused the father.

EXEMPLARY OR VINDICTIVE DAMAGES WILL NOT BE ALLOWED to a father for an injury to his infant son, and will only be allowed to the immediate person receiving the injury, either in a suit prosecuted by himself or by some one for his use.

Action for damages by one Black against the Carrollton Railroad Company for injury to his infant son. The facts are stated in the opinion.

Goold and Hunt, for the plaintiff.

Duncan, and Benjamin and Micou, for the defendants.

By Court, BUCHANAN, J. The plaintiff's son, a lad of fourteen, a passenger in the defendants' train, on its regular trip from Carrollton to New Orleans, had both legs broken by the upsetting of a railroad car. The accident was caused by the switch being out of place. The switch-tender was not at his post, or the accident would not have happened. He was a servant of the defendants, and they are liable for the consequences of his negligence.

This action is for damages resulting from this railroad accident to the father of the wounded boy; and the legal question is presented for our consideration, what damages can be allowed to plaintiff, as distinguished from his son, who is no party to the cause, neither is anything claimed therein for his use and benefit. The argument of the learned counsel of defendants would confine the plaintiff's cause of action to the pecuniary loss proved to have been actually incurred previous to the institution of the suit; but we do not understand the measure of damages, under the legislation of Louisiana, to be so restricted. The article 1928 of the civil code, paragraph 3, enacts that, in the assessment of damages in cases of offenses, *quasi* offenses and *quasi* contracts, much discretion must be left to the judge or jury. Under this rule it was competent for the jury to find more than the actual pecuniary loss proved.

That loss seems to have been composed of two items, the charges for medical and surgical attendance, including medicines and nursing, and the neglect of plaintiff's business for two months and a half during his son's illness. We are of opinion that the jury could properly take into consideration also the prospective loss to plaintiff likely to arise from the crippled state of his son, which may render him a burden to his father during a period when he would, were it not for accident, be able to provide for his own support, if not to succor and assist his father.

The actual damage proved does not fall short of two thousand five hundred dollars; and the prospective probable damage may reasonably be estimated, under the evidence, at two thousand five hundred dollars more.

In the view that we have taken of the measure of damages applicable to the defendants, as regards the plaintiff in this action, the verdict of the jury, ten thousand dollars, appears excessive. The jury seems to have taken into view the shock to the parental feelings, and the solicitude and anxiety of the parents of the sufferer, which must be supposed to have been the consequence of the grave injuries and protracted convalescence of their child; and which are declared upon by plaintiff as elements of damages.

But we are not disposed to admit the soundness of a doctrine which would extend vindictive damages to a case like the present. We carefully note the distinction between the immediate sufferer from a railroad accident and a relative of the sufferer, however near may be that relation. The subject is one of great and of increasing importance in our country, where railroad

communication is so largely developed. Railroad companies are a species of common carriers of comparatively recent date; yet their engines have already superseded the more tardy and less powerful vehicles of the past generation upon all the great thoroughfares of the land. It is therefore of great public concern that the measure and extent of the liabilities of railroad companies should be determined with precision. They ought, doubtless, to be held to accountability for the misconduct of their servants. Like all corporations, they can only act through servants or agents. More than almost any other kind of corporation, their corporate business subjects them to the risk of accident. It is a duty which such a company owes to the public to make velocity of locomotion compatible with safety, so far as this can be affected by prudence and skill. It is moreover an implied condition of their contract with each passenger that the latter shall not be put in jeopardy of life or limb by any fault, even the slightest, of the servants of the company. The sentiment of responsibility will be found the greatest safeguard against abuses; but at the same time that we are disposed strictly to enforce that responsibility, we deem it advisable not to extend the right to recover vindictive damages to others than those who in their own proper persons are victims of the misconduct of the servants of a railroad company. Were this suit prosecuted for the behoof of the mutilated individual himself, it is possible we would not think the verdict of the jury too high. In that case, the bodily pain and suffering, the deformity of person, the diminished capacity of laborious exertion, might reasonably justify damages of the class called vindictive or exemplary, the standard of which is of necessity exaggerated beyond the limits of an exact arithmetical appreciation—being, as the title imports, in the nature of a penalty and of an example—partaking of the character of public justice while redressing a private wrong. It may be well supposed that the mutilation of a healthy and promising boy, the pride of his parents, and the example of his school-mates, such as the petition describes the plaintiff's son, has excited feelings of keenest anguish in the breasts of his relatives, and of the most painful sympathy in many who were not endeared to him by the ties of kindred. But we do not understand the object of the law to be the punishment of an offending party for having been the cause of unpleasant emotions in the family and acquaintances of the party offended; and this in the form of a pecuniary compensation to the relative or friend thus affected. Were such

the law, the consequence of an offense to the offender would be greater or less in proportion to the larger or smaller circle of friends of him who has been offended. This would be obviously to misplace the aim of public justice.

Upon these considerations, we think it proper to reduce the verdict in this case in conformity to the estimate above expressed.

It is therefore adjudged and decreed that the judgment of the district court be reversed; that plaintiff and appellee recover of defendants and appellants five thousand dollars damages, with interest from the twelfth of March, 1852, date of the judgment appealed from; the costs of the court below to be borne by appellants, and those of appeal by appellee.

OGDEN, J., delivered a concurring opinion.

SLIDELL, C. J., delivered a dissenting opinion, differing from the opinion of the court only in the measure of damages sustained. He held that the sum of one thousand five hundred dollars for medical attendance should be allowed, but that the father's time during the son's illness could not be estimated because of the meagerness of the evidence on that point; the evidence being that the father was a produce broker, and lost sixty-nine days' time in a busy season of the year, the average amount of his receipts or earnings not being shown.

LIABILITY OF RAILROAD COMPANY FOR INJURY CAUSED BY NEGLIGENCE OF ITS SERVANTS: *Peters v. Rylands*, 59 Am. Dec. 746; *Stone v. Cheshire R. R. Corporation*, 51 Id. 192; *Walling v. Mayor etc. of Shreveport*, 52 Id. 608; *Ware v. Barataria & L. Canal Co.*, 35 Id. 189, and note; *Inhabitants of Lowell v. Boston & Lowell R. R. Corporation*, 34 Id. 33.

FATHER CAN RECOVER DAMAGES FOR INJURY TO HIS CHILD, although child is too young to render service, if father has been put to expense in the care and cure of the child: *Dennis v. Clark*, 48 Am. Dec. 671. See note to *Carey v. Berkshire R. R. Co.*, Id. 622, where actions for injuries to children are discussed and authorities collected; see also *Kennard v. Burton*, 43 Id. 249.

EXEMPLARY DAMAGES MAY BE ALLOWED IN ACTIONS UPON CASE as well as trespass: *Fleet v. Hollenkemp*, 56 Am. Dec. 564. Upon the subject of exemplary damages, see note to *Austin v. Wilson*, 50 Id. 767.

THE DISSENTING OPINION IN THE PRINCIPAL CASE IS CITED in the dissenting opinion of Wyly, J., to the point that vindictive damages are allowed only as penalties for violations of the law, in *Richardson v. Zantz*, 26 La. Ann. 316; also cited to the point that in estimating damages jury may consider loss likely to arise from crippled state of one receiving injury: *Donnell v. Sandford*, 11 Id. 645.

THE PRINCIPAL CASE IS CITED to the point that damages may be given for future suffering resulting from injury, in *Warner v. Bacon*, 8 Gray, 405; also cited in *Varillat v. Carrollton R. R. Co.*, 10 La. Ann. 89, to the point that exemplary damages will be allowed if the circumstances of the case warrant it.

DUNLAP v. FRERET.

[10 LOUISIANA ANNUAL, 83.]

PLAINTIFF IS NOT ESTOPPED FROM SHOWING FALSEITY OF RETURN, in an action against a sheriff because of offering the return in evidence, but he must prove the judgment, writ, and return, and then show the return to be false.

BURDEN OF PROOF.—When it is shown by *prima facie* evidence that a sheriff's return is incorrect, the burden of proof is upon the sheriff to show its correctness.

SHERIFF, UNDER STATUTES AND DECISIONS OF LOUISIANA, CANNOT DEMAND INDEMNITY BOND upon a seizure of goods and demand for release. He must either call a jury to determine whether the goods belong to the defendant or act at his own peril.

ACTION against sheriff for false return of execution. The opinion states the facts.

Durant and Horner, for the plaintiff.

Blache, for the defendant.

By Court, SLIDELL, C. J. The sheriff appeals from a judgment condemning him to pay the amount of an execution which he levied on goods of Michael O'Connor, the judgment debtor, and which he released, on the representation of one Jackson that the goods were his, and on the refusal of the plaintiff to give him a bond of indemnity.

The main issue between these litigants is whether the goods so seized and then released were the property of the defendant in execution. An examination of the evidence, of which the district judge has given an able review, has not satisfied us that he came to an erroneous conclusion. The veil which the parties had thrown over O'Connor's property was flimsy; though we are satisfied the sheriff acted honestly, and committed merely an error of judgment.

It is obviously inadmissible to say that the plaintiff is estopped by offering the return of the sheriff, which, in substance, states that the goods seized and then released were not the property of Michael O'Connor. On the contrary, in an action for false return, the judgment, writ, and return must be proved; and then evidence must be introduced of its falsity. And where, as in this case, a levy had been made, showing that the sheriff considered at the time that the goods were the property of the defendant in execution, it seems just to say that *prima facie* evidence of the incorrectness of his return is sufficient to cast upon him the burden of proving property out of the defendant in exe-

cution. See 2 Greenl. Ev., sec. 592; Pet. Abr., verb. Sheriff; *Magne v. Seymour*, 5 Wend. 310. There is nothing in *Webb v. Kemp*, 2 La. Ann. 370, which militates against this doctrine. There the action was to make the sheriff liable, under the act of 1826, for having failed to return the writ of *fieri facias* within the delay prescribed by law. The only evidence offered was the return of the sheriff, which showed that the sheriff had acted under the express instruction of the plaintiff. There being no evidence to the contrary, the court said that no more valid excuse could be given.

It is urged for the defendant that it appears from the sheriff's return that on being threatened with suit by Jackson if he persisted in the seizure, the sheriff notified the plaintiff's attorneys that he would give up the seizure unless they furnished a bond of indemnity, and that they refused to give any bond. We are not aware of any provision of our law, or adjudged case in our reports, which recognizes the right of the sheriff to claim a bond under such circumstances, and if refused, to abandon the seizure; nor have we found authority in the practice of our sister states or England that the sheriff, in such case, may demand a bond merely because he sees, or thinks he sees, danger to himself in holding on to his seizure. From the New York and English cases Mr. Justice Sutherland, in *Curtis v. Patterson*, 3 Cow. 67, deduced this rule: that if no indemnity be offered, it is the sheriff's duty to call a jury, and if they find the property not in the defendant, the sheriff is justified in returning *nulla bona*; but if after such inquisition the plaintiff offers a sufficient indemnity, the sheriff must proceed and sell; and that a sheriff acts at his peril in returning *nulla bona* under any other circumstances. See also *Magne v. Seymour*, 5 Wend. 309; and as to the jurisprudence in Louisiana, see *Lacy v. Buhler*, 8 Mart. N. S. 664.

He who accepts the office of sheriff certainly undertakes grave responsibility and serious risks. On the one hand, if the creditor points out property to the sheriff which really belongs to the debtor, and deceived by false appearances or misrepresentations he omits to seize, he is liable to the creditor. On the other hand, if he takes the goods of another, though the plaintiff assures him they are the defendant's, he is answerable in damages to the owner. With the creditor at his back urging a seizure, and a claimant in front warning him to cease, often perplexed by the shifts of a cunning debtor, or embarrassed by the confidence or carelessness of an honest owner, the position of

this officer, everywhere delicate and dangerous, is peculiarly so in our own state. *Dextrum Scylla latus, larum implicata Charybdis obsidet.* It is certainly to be regretted that the hardship of his position, which was the subject of comment in *McDonald v. Lewis*, 4 La. Ann. 201, has not been mitigated by legislation. It was well remarked by Chief Justice Eustis, in that case, that "a law empowering sheriffs to summon a jury to determine on doubtful questions relating to the ownership of property, which is directed to be seized in execution, modified as it is in England and many of our states by a settled jurisprudence, would be of great public benefit, and no more than a just protection to the public officer in the discharge of his difficult and important duties."

Judgment affirmed with costs.

SHERIFF CANNOT REQUIRE INDEMNITY, before levying execution, because property is in dispute: *Pennington's Ex'r's v. Yell*, 52 Am. Dec. 262; *Foster v. Fessard*, 49 Id. 492.

TIOS v. RADOVICH.

[10 LOUISIANA ANNUAL, 101.]

WHEN SEAMAN WILLFULLY DISOBEYS CAPTAIN'S ORDERS, and is discharged for so doing, he is not entitled to any rights which he might have if he had continued doing his duty.

IT IS SEAMAN'S DUTY, IN CASE OF DISASTER, TO EXERT HIMSELF to save the cargo, and as long as there is any prospect of saving the cargo, he is bound to obey the commander.

ACTION for damages. The opinion states the facts.

J. J. Lugenbühl, for plaintiff.

C. Dufour, for defendant.

By Court, OGDEN, J. The plaintiff was second mate on board the brig Union, which was wrecked off the Mexican coast in January, 1852, while under the command of the defendant, who was captain and owner of the vessel.

This action is brought to recover damages from the captain, on the ground that without any just or sufficient cause he had discharged the plaintiff, and left him on a barren beach without provisions and the necessaries of life, and that he had been subjected to great loss, suffering, and expense in getting back to New Orleans, to which port, by the shipping articles, the vessel was to return.

The defendant justifies his discharge of the plaintiff on the

ground that he with most of the crew had behaved in a most undisciplined and provoking manner; had disobeyed his orders, refused to work, and fomented discord. He further avers that his offers of assistance to the crew had been systematically declined with a view to a vexatious prosecution.

It appears from the evidence that the vessel was cast away about a mile from the beach, and at a distance of about twenty miles from Cozacualco. That by the labor of the crew, with the assistance of some Mexicans with a canoe, hired by the captain, a considerable part of the cargo, together with the ship's stores, the rigging, sails, and spars of the vessel, were taken ashore, and tents were erected on the beach for the temporary accommodation of the crew. Up to that time it does not satisfactorily appear that the crew had refused to work, but the testimony conclusively establishes that the captain, having determined to go to Cozacualco in the canoe in order to procure a boat or ship's launch to take what had been saved from the wreck to Cozacualco, sent his chief officer for four of the men to go with him; that the plaintiff and most of the crew refused to obey this order unless the captain would consent to take the clothing of the crew first; that on receiving this answer to his message, the captain sent his chief the second time to say to his crew that he wanted the stores of the ship to be first carried; and that they answered the second time that they would not go unless their own clothing was taken first.

This conduct on the part of the plaintiff can be viewed in no other light than that of insubordination. The command of the captain was a lawful one, and to have permitted the crew to dictate the condition on which they would yield obedience to a lawful command would have been the virtual surrender of his authority as captain, and an abandonment of his own duty and obligations, which could not have been discharged without maintaining the supremacy with which the law invested him.

In cases of shipment, it is part of the duty of a seaman to exert himself to save the cargo, and as long as he has any duty to perform, he is subject to the commands of the master of the ship.

The law on this subject is laid down in Abbott on Shipping, 173, to be, that even when the ship has gone to pieces, the seaman is not at liberty to depart from the shore where the mischance has been encountered. Quoting the language of a learned

judge in admiralty: "He has a right to cling to the last plank, in satisfaction of his wages, and is bound to stand by and obey the master as long as there remains, in his judgment, a prospect of recovering any part of the ship or cargo." See also Abbott on Shipping, 176, 177; 1 Kent's Com., lect. 46.

Disobedience to a lawful command of the master may be committed under circumstances which would not amount to insubordination; when the disobedience is willful, it is a grave offense, and would certainly justify the discharge by the master; but where it is not only willful, but is persisted in so as to set at defiance the lawful authority of the master, it amounts to insubordination, and not only justifies an immediate discharge of the seaman, but destroys all rights which he might otherwise have growing out of the relation between the parties.

The several acts of congress referred to by the appellant's counsel for regulating and securing the rights of seamen were not designed to afford them protection in cases when, by willful disobedience amounting to insubordination, they have chosen to forfeit rights which it was the object of the humane laws of congress to secure to them.

Under the circumstances of this case, we do not consider it material that there was no formal discharge of the plaintiff until after the captain had returned with the launch from Cozucualco. When the captain for the second time made a call for the men to go with him, and they refused, as they were then on a foreign shore, their refusal to accompany the captain was on their part virtually an abandonment of the captain, and a denial of his authority over them.

There is no evidence to support the plaintiff's claim for damages on the ground of defamation of character.

The judgment of the court below is therefore affirmed with costs.

SEAMAN FORFEITS WAGES BY DESERTION: *Webb v. Duckingfield*, 7 Am. Dec. 388; *Spencer v. Eustis*, 38 Id. 277.

STATE v. PATTEN.

[10 LOUISIANA ANNUAL, 299.]

SANITY OR INSANITY OF PRISONER IS MATTER OF FACT FOR JURY. The admissibility of evidence to establish insanity is a matter of law for the judge.

USUALLY DEFENDANT IN CRIMINAL ACTION CAN CONTROL OR DISCHARGE HIS COUNSEL; but if the sanity of the defendant is in issue, the court

should allow evidence on that point, even though against defendant's will, when offered by his counsel.

IT IS ERROR FOR COURT TO DISCHARGE COUNSEL OF DEFENDANT, in a criminal action, at the defendant's demand, and submit his case to the jury upon the evidence of the state, when counsel offers to show by the testimony of witnesses that at, before, and since the time of the commission of the act the prisoner was insane.

This opinion is complete without any statement of facts.

Isaac E. Morse, attorney general, for the state.

Larue and Whitaker, and Hennen, for the defendant.

By Court, SPOFFORD, J. Upon the trial of James Patten for the murder of Walter Turnbull, the following bill of exceptions was taken by the prisoner's counsel: "Be it remembered, that on the trial of this cause, on the twentieth of March, 1854, after the evidence on the part of the state was closed, and when the counsel of the prisoner were proceeding to prove, by the evidence of the witnesses, the insanity of the said prisoner at the time of the killing set forth in the indictment, and a long time before, and even since, the said killing, the said prisoner arose, and objected to and repudiated the said defense, and insisted upon discharging his counsel and submitting his case to the jury without any further evidence or action of his counsel in his defense; his counsel opposed and remonstrated against the prisoner's being permitted to do so, alleging that they were prepared to prove the defense by clear and irresistible testimony; but the court overruled the objection of the said counsel, and permitted the prisoner to discharge his counsel, and refused to hear them further in his defense, and gave the case to the jury without any further evidence or pleading on his behalf; to all which opinion and ruling of said court the defendant's said counsel excepts, and prays his exceptions may be signed," etc. Signed, Jno. B. Robertson, Judge.

There was a verdict of "guilty, without capital punishment," and after his former counsel had, in the quality of *amici curias*, attempted to obtain a new trial and an arrest of judgment without success, the prisoner was sentenced to hard labor for life in the penitentiary. From that judgment the present appeal has been taken.

The sanity or insanity of the prisoner is a matter of fact; the admissibility of evidence to establish his insanity, under the circumstances detailed in the bill of exceptions, is a matter of law, and the only matter which the constitution authorizes the tribu-

nal to decide. The case is so extraordinary in its circumstances that we are left without the aid of precedents.

In support of the ruling of the district judge, it has been urged that every man is presumed to be sane until the contrary appears, and that a person on trial for an alleged offense has a constitutional right to discharge his counsel at any moment, to repudiate their action on the spot, and to be heard by himself; hence the inference is deduced that the judge could not have admitted the evidence against the protest of the prisoner without reversing the ordinary presumption and presuming insanity.

In criminal trials, it is important to keep ever in mind the distinction between law and fact—between the functions of a judge and those of a jury. It was for the jury, and the jury alone, to determine whether there was insanity or not, after hearing the evidence and the instructions of the court as to the principles of law applicable to the case. By receiving the proffered evidence for what it might be worth, the judge would have decided no question of fact; he would merely have told the jury: "The law permits you to hear and weigh this evidence; whether it proves anything, it is for you to say." By rejecting it, he deprived the jury of some of the means of arriving at an enlightened conclusion upon a vital point peculiarly within their province, and in effect decided himself, and without the aid of all the evidence within his reach, that the prisoner was sane.

It is idle to say that the legal presumption, and the prisoner's own declarations, appearance, and conduct on the trial, established his sanity to the satisfaction of both judge and jury; for presumptions may be overthrown, declarations may be unfounded, and conduct and appearances may be deceitful. And the prisoner's counsel, sworn officers of the court with their professional character at stake upon the loyalty of their conduct, alleged that they stood there prepared to prove, by what they deemed clear and irresistible testimony, that the accused was insane at the time of the homicide, long before, and ever since; so that the sole inquiry now is, not whether they or the court were right as to the fact of sanity, upon which we can have no opinion, but whether they should have been allowed to put the testimony they had at hand before the jury, to be weighed with the counter-evidence.

If the prisoner was insane at the time of the trial, as counsel offered to prove, he was incompetent to conduct his own defense unaided, to discharge his counsel, or to waive a right.

Upon the supposition that the counsel were mistaken in regard

to the weight of the evidence they wished to offer, as they may have been, still its introduction could do the prisoner no harm, nor could it estop him from any other defense he might choose to make on his own account; neither could it prejudice the state, for it is to be presumed that the jury would have given the testimony its proper weight; if, on the other hand, the counsel were not mistaken as to the legal effect of this evidence, the consequences of its rejection would be deplorable indeed.

The overruling necessity of the case seems to demand that whenever a prisoner's soundness of mind and consequent accountability for his acts are in question, the rule that he may control or discharge his counsel at pleasure should be so far relaxed as to permit them to offer evidence on those points even against his will.

Considering, therefore, that it would be more in accordance with the sound legal principles and with the humane spirit which pervade the criminal law to allow the rejected testimony to go before the jury, the cause must be remanded for that purpose.

It was said in argument, on behalf of the state, that the alleged insanity was, at most, but a monomania upon another topic, which could not exempt the prisoner from responsibility for the homicide.

The judge will instruct the jury in regard to the principles of law which govern this subject, when all the facts shall have been heard. At present the discussion is premature.

It is therefore ordered that the judgment of the district court be reversed, the verdict of the jury set aside, and the cause remanded for a new trial according to law.

KILGORE v. GREVEMBERG.

[10 LOUISIANA ANNUAL, 689.]

PROPRIETOR OF LAND FRONTING ON BAYOU CANNOT MAINTAIN ARTIFICIAL DRAINAGE, throwing the water upon the rear plantation, when the natural drainage is lateral, in consequence of being intercepted by a ridge.

ACTION by W. Kilgore against C. and G. Grevemberg, to prevent their maintaining artificial drainage ditches, and for damages. The opinion states the facts.

H. C. Wilson and T. H. Lewis, for the plaintiff.

J. G. Olivier and H. Gibbon, for the defendants.

By Court, MERRICK, C. J. This action is brought by the plaintiff to compel the defendants to close certain ditches which throw the water in large quantities upon the plantation of plaintiff, and to recover damages in consequence of the same.

The defendants' plantation is situated upon the bayou Teche, and extends back, as to a part of the same, between two and three miles.

The plaintiff's plantation is situated a short distance in the rear of the defendants' plantation, a tract of land intervening between them.

At the termination of the upper line of the defendants' plantation (this line not extending back the whole distance, but forming a corner with the back line from which the upper rear line projects some distance below), there is a natural ridge of land extending across, or nearly across, the defendants' plantation.

The flow of the waters from the natural drainage of the front portion of defendants' plantation was each way along a depression or *coulée* directly in front of this ridge of land; the one portion running transversely across the corner of the plantation adjoining above, into a bayou running to the rear of the plantation, and the other making off at nearly right angles with defendants' lower line, into a marsh. Five of the ditches complained of cut through the ridge referred to, and conduct almost the entire drainage of defendants' plantation to the rear, at a point where it overflows the plaintiff's. The defendants' lower ditch, running between a mile and a half and two miles, flows into a *coulée* extending across defendants' plantation, and has the same tendency.

There have been two jury trials, both of which have terminated in the favor of plaintiff. The first (which was set aside by the judge then presiding) ordered the ditches to be filled, and gave the plaintiff five dollars damages.

The last verdict gave the plaintiff two thousand dollars damages, and directed the ditches to remain open.

Judgment having been rendered thereon, defendants have appealed. The plaintiff has filed an answer to the appeal, praying an amendment of the judgment, and that the ditches should be closed.

On the part of the defendants, it has been contended that, under the authority of *Becknell v. Weindhal*, 7 La. Ann. 291, every front proprietor upon a watercourse has the right to drain his land from the front to the rear, because, as is there said, the natural flow of the water is in the direction of the swamps in the rear.

But in the case before us, it is shown that this natural drainage of the front portion of the defendants' plantation was interrupted by a ridge of land, and that the natural drainage was lateral upon the depressed portions of the plantations, both above and below. It would therefore be unjust to say that because the plaintiff happens to reside upon *une langue de terre* in the rear of defendants' plantation, that therefore his plantation should be condemned in part to sterility. He has the same right to protection that the front proprietor has; and the mere fact of residing on the bayou gives the front proprietor no right to occasion by artificial works the overflow of such elevated land in the rear as otherwise would not be subject to such overflow.

Two juries have found verdicts in favor of the plaintiff; and although the last verdict is perhaps informal, we think the issue has been in substance determined in favor of the plaintiff.

From their superior opportunities of judging of the locality and witnesses, we should feel a hesitation in setting aside their verdict, even if we had some doubts as to the correctness of their finding. In this case, however, the testimony leads us to the same conclusion, viz., that the issue should be determined in favor of the plaintiff; but we think he is entitled to have the ditches closed at the point of land dividing the waters of the front portion of the defendants' plantation from the rear, and that in consequence the damages allowed should be reduced. The testimony is not very definite in regard to the amount of damages sustained. We think two hundred and fifty dollars all we are authorized to grant under the evidence.

It is proper to remark that we have not permitted the advantage which the plaintiff's plantation has derived from the large canal excavated by O. Delahoussaye to influence our opinion in this case, for that is a matter foreign to the issue before us.

It is therefore ordered, adjudged, and decreed by the court that the judgment of the lower court be so amended as to reduce the damages allowed by said decree to the sum of two hundred and fifty dollars, and also so as to order, adjudge, and decree the defendants to close all the ditches and canals upon their plantation which are cut through the ridge of land formed on the upper line of the defendants' plantation, at about the distance of one hundred and sixteen chains and thirty-six links from the bayou Teche, on said line, and which said ridge extends from the point where the same is touched by said upper line, in an easterly direction across, or nearly across, the de-

fendants' plantation; said ditches and canals to be closed and filled up at the point only where they are cut through said ridge of land herein indicated; and that it is further ordered that the long ditch or canal on or near the defendants' lower line be closed at the point where the extension of said ridge would fall across said ditch at right angles; and it is further ordered that, if need be, a writ of *distringas* issue to enforce this judgment; and that the judgment of the lower court, as amended, be affirmed, and that the defendants pay the costs of both courts.

PROPRIETOR OF LAND MUST DO NOTHING WHICH WILL MAKE NATURAL SERVITUDE OF DRAIN MORE ONEROUS to a lower proprietor. Servitude must not be increased or created by the industry of man: *Martin v. Jett*, 32 Am. Dec. 120, and note 123, where the subject is discussed at length. The principal case is cited as not being applicable in *Avery v. Police Jury*, 12 La. Ann. 557.

SUCCESSION OF LEWIS.

[10 LOUISIANA ANNUAL, 789.]

MINOR CHILDREN USUALLY RETAIN DOMICILE OF THEIR DECEASED PARENT; but when a natural tutrix, the mother of a child, removes her domicile to another country, taking her child with her, the domicile of the child is changed with that of the mother.

FOREIGN TUTOR, APPOINTED BY COURT IN FOREIGN COUNTRY, which is the domicile of the ward, may, under the sanction of the court where the ward's property is situated, do acts in relation thereto which the interests of his ward require.

The opinion states the facts of the case.

M. M. Cohen, for Albey.

J. B. and C. T. Bemiss, contra.

By Court, LEX, J. Felix Albey, who resides in France, is appellant from a judgment refusing to recognize him as tutor of the minor Mary Annette Lewis, and to permit him, in his said capacity, to take such steps for the preservation and administration of the estate of said minor as her interest may require. The state of facts upon which this decree was rendered, so far as they are necessary to an elucidation of the case, are substantially as follows: Mary Ann Hare, the mother of the minor whose tutorship is the subject-matter in contestation, married Edward D. Lewis, of this city, who died at Nice, in Sardinia, on September 3, 1848. The sole issue of this marriage was a posthumous child, born two days after her father's

death. Upon her return to New Orleans, Mrs. Lewis was appointed and qualified as natural tutrix of her minor child. In 1853 Mrs. Lewis married the present applicant, after having obtained the consent of a family meeting, duly homologated, that she should retain the tutorship of her daughter. Her husband resided in France, to which country she removed, taking her daughter with her. She continued to reside in France until the month of September, 1854, when she died, leaving her husband testamentary tutor of her child. It is upon this appointment, duly confirmed by the proper tribunals of the domicile of the deceased at the time of her death, that the petitioner rests his application to be recognized by the tribunals of this state, so as to enable him to enter upon the administration and control of the assets belonging to his pupil.

This application is resisted on the ground that the father of the minor having been, at the time of his death, a citizen and resident of this city, where his estate is situated, and where his succession was opened, his minor child is also a citizen of the state, and that the courts of France have no power to appoint or confirm a tutor to an American minor, and that the succession of the father being under administration in one of the courts of this state, that tribunal alone has jurisdiction over the person and property of the minor. The first question to be determined in this case is, whether the minor's domicile is in France or Louisiana. The children of parents domiciled in this state at the time of their decease no doubt retain the domicile of their parents, and the courts of the state having jurisdiction of this domicile have exclusively the power of appointing those who are intrusted with the control of the persons and the administration of the property of minors so situated; and as a general rule the domicile of the minor cannot be changed by a departure of the tutor or the removal of the minor from the state.

But this general rule cannot, in the nature of things, "embrace cases where a parent leaving the state takes his child along with him." The right of expatriation, as was remarked by Derbigny, J., in the case of *Delacroix v. Boisblanc*, "is not questionable in a free country," and "that a natural tutor expatriating himself has a right to take his children with him is still less disputable:" 4 Mart. O. S. 716, 717. The natural tutrix appointed by the court of the original domicile in this case removed her domicile to France, taking her child with her, and the domicile of the child was changed with that

of the mother. She died in France, and her succession was opened there, and the court of the common domicile of both mother and child appointed a tutor to the minor in accordance with the terms of the will of the last surviving parent.

This appointment is in every respect legal. The objection that the court of France had no power to appoint a tutor to an American minor cannot be consistently maintained by courts that are themselves daily making appointments of a similar character. The application stands before the court, therefore, in the same light as would a tutor legally appointed to a minor born in France; with all the rights which any foreign tutor would have with reference to property in this state belonging to his ward. The petitioner in this case asks that he be "recognized as tutor," and that as such he may be allowed to obtain such orders, decrees, judgments, and proceedings as may be "legal and equitable," and "to the court may seem meet and proper." We do not understand this application as claiming the right to act otherwise than under the orders of the court, and therefore, of course, in accordance with the laws of the state. The rights of guardians and tutors deriving their authority from the laws and tribunals of one state with reference to the property of their wards situated in another has been the subject of frequent and inconclusive controversy. Mr. Justice Story's work on the conflict of laws contains a compilation of authorities which is itself the fruitful source of divergent opinions.

It may be sufficient, therefore, as furnishing a safe and consistent rule of action founded on considerations of expediency and policy, to refer to the precedents of our own jurisprudence. In the case of *Berluchaux v. Berluchaux*, 7 La. 547, it was held to be "a doctrine not controverted by the court, that the tutor of a minor, deriving his authority from the law of their common domicile, has a right to exercise the actions of his pupil everywhere, the comity of nations recognizing the validity of such an authority." It was announced in that case that had a tutor, duly qualified at the place of the minor's domicile, claimed the right to represent said minor in the proceedings for a partition, such right would have been recognized.

In *Chiappella v. Couprey*, 8 La. 86, it was determined that a tutrix residing in France might sue for and take possession of property situated in Louisiana belonging to the inheritance of her ward, and that such tutrix would be recognized in the courts of this state without confirmation by its tribunals,

and that such tutrix might exercise her office by an agent or attorney in fact residing here; and in accordance with this doctrine, the sum of eleven thousand five hundred dollars was paid over to the agent of a foreign tutor. In the *Matter of the Succession of Senac*, 2 Id. 258, the right of a widow residing in France to stand in judgment as the representative of her child was again expressly recognized.

The act of 1843, page 97, it is true, is limited in its application to tutors or guardians residing within the United States; it has, moreover, reference to the removal of property from the state; but it is to be observed that the act appears to have been intended as an enlarging, not as a restrictive, statute, and was properly passed for the purpose of quieting all doubts with reference to the question which had divided the opinions of jurists. Be this as it may, we see nothing in the previous or subsequent jurisprudence of the state which would prevent a foreign tutor from being recognized as entitled to stand in judgment in all conservatory or administrative measures which the interests of his ward might require. He may provoke, by and with the advice of a family meeting and under the sanction of the court, the investment of the funds of the minor, or the sale of his property and the reinvestment of its proceeds. Article 946 of the code of practice appears to have been intended to provide for a case where the minor was not represented, but is not applicable where the tutor, though a non-resident, is either present or represented. In the case of *Mourain v. Poydras*, 6 La. Ann. 158, Eustis, C. J., held that in relation to the power of a court to direct the funds of a succession to be retained or remitted for distribution, under the sanction of the tribunals of the domicile of the testatrix, we consider there can be no question. Its exercise is a matter of discretion depending on the circumstances of each case, and on the established comity prevailing between nations in amity with each other; and this doctrine we take to be in accordance with the growing spirit of liberality which characterizes the modern intercourse of nations. See also *Graville v. Richard*, 13 La. 297.

We do not wish to be understood as limiting in any manner the right which every creditor or party interested may have to insist upon the appointment of an administrator or curator of an estate in cases where their interests require such an appointment. In the case at bar, the estate appears to be free from debt, and the only interest represented is that which is personal to the minor; we can see no good reason why the tutor of the dom-

icile should be embarrassed by the appointment of a domestic tutor. The under-tutor has acted in good faith, and with reference to the proper discharge of his duty. He ought not, therefore, to be condemned personally to pay costs.

It is therefore ordered that the judgment appealed from be reversed, and that Felix Albey be recognized as the tutor of the minor Mary Annette Lewis, and as such entitled to represent the interest of said minor in all matters rendered necessary in the administration of the personal interests of said minor in the succession of her father, subject to the order of the court and to its sanction in all proceedings had therein, and to such requirements as respects the furnishing of security as the court in its discretion may impose.

It is further ordered that the costs of these proceedings in both courts be paid by the estate.

DOMICILE OF INFANTS: Note to *Ringgold v. Barley*, 59 Am. Dec. 112.

WHEN DOMICILE OF INFANT IS CHANGED: *Allen v. Thomason*, 54 Am. Dec. 55, and note citing authorities.

SHOULD MOTHER OF INFANT SURVIVE FATHER, DOMICILE of the infant follows that of its mother during widowhood: *School Directors v. James*, 27 Am. Dec. 525.

FOREIGN GUARDIAN HAS NO POWER OVER PERSON OR PROPERTY OF WARD situated in another state: *Williams v. Stoors*, 10 Am. Dec. 343; *Kruef v. Wickey*, 23 Id. 569.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

MAXWELL v. BROWN.

[39 MAINE, 93.]

STATUTE OF FRAUDS—DELIVERY.—Under that section of the statute of frauds which provides that "no contract for the sale of any goods, wares, or merchandise for the price of thirty dollars or more shall be allowed to be good unless the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment," or some writing properly signed, a mere delivery of goods to the purchaser will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound.

STATUTE OF FRAUDS—DELIVERY.—Where plaintiff called upon defendant and offered to sell him a cargo of coal at a certain rate, defendant to pay the freight, which offer the defendant accepted, and plaintiff accordingly sent him the coal by a vessel which was wrecked on the way, thereby preventing defendant from receiving the same, plaintiff cannot maintain an action against him for the purchase price; as under the statute of frauds, in the absence of a written memorandum of sale, there would have to be an acceptance by the buyer as well as a delivery by the seller.

Assump~~tion~~ to recover the price of a cargo of coal, shipped by the plaintiffs, who lived in Delaware, to the defendant, who lived in Maine. The opinion states the facts. After the plaintiffs' case was presented, the lower court ordered a nonsuit, to which plaintiffs excepted.

Shepley and Dana, for the exceptions.

Bard and W. P. Fessenden, contra.

By Court, APPLETION, J. This is an action of *assumption*, in which the plaintiffs seek to recover of the defendant the price of two hundred and eighty-four tons of coal, alleged to have been shipped at Philadelphia on board the schooner General Hersey.

From the evidence, as reported, it appears that one of the plaintiffs, who are merchants residing at Philadelphia, called on the defendants at Portland and proposed to sell him a quantity of coal; that the price was to be three dollars and sixty-five cents per ton; that after some conversation on the subject the defendant said, "Well, you may send me a cargo;" that something was said about sending a vessel from Portland, but the bargain, as finally concluded, was that the plaintiffs should procure a vessel and send defendant a cargo. There was no limit as to the size of the vessel.

The coal was shipped by the plaintiffs on board a vessel chartered by them and consigned to the defendant, and the master signed a bill of lading in the usual form, engaging to deliver the coal to the defendant upon his paying freight. The vessel was cast ashore on Cape Henlopen; part of the cargo was thrown overboard to lighten the vessel; the master then took the vessel back to Philadelphia, called a survey, and it being considered advisable to sell the balance of the cargo, it was done, and due notice was given thereof to the plaintiffs and defendant, neither of whom acknowledged the notice or made any answer thereto.

The defense rests upon the statute of frauds, R. S., c. 136, sec. 4, which is in these words: "No contract for the sale of any goods, wares, or merchandise, for the price of thirty dollars or more, shall be allowed to be good unless the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the party, to be charged by such contract, or by his agent, thereunto by him lawfully authorized." The language of our statute is almost verbally identical with that of the seventeenth section of 29 Car. II., c. 2, which is the English statute on the same subject. The construction, therefore, which the English courts have given to similar language in their statutes must be regarded as of no slight authority.

From the language of this statute it is apparent that when there is no written contract a mere delivery will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound. In *Badley v. Parker*, 2 Barn. & Cress. 37, "It was formerly considered," observes Rust, J., "that a delivery of goods by the seller was sufficient to take a case out of the seventeenth section of the statute of frauds; but it is now clearly settled that there must be an acceptance by the buyer, as well as a delivery by the seller." In *Tempest v. Fitzgerald*, 3 Barn.

& Ald. 680, the defendant, in August, 1817, bargained for a horse which he was to take away about September 22d following. The parties understood it to be a ready-money bargain. On September 20th the defendant used the horse, gave directions respecting it, and requested the plaintiff's son to keep it for him another week, which he engaged to do. The horse died on September 26th, and the defendant refusing to pay for the horse, an action for its price was commenced, but it was held that no right of property passed till the price was paid, and that the action could not be maintained.

In *Holmes v. Hoskins*, 9 Exch. 752, the defendant verbally agreed to purchase of the plaintiff some cattle then in his field. After the bargain was concluded the defendant felt in his pocket for his check-book in order to pay for them, but finding he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done. In this case it was held there was no evidence of an acceptance of the cattle to satisfy the statute of frauds. In *Hunt v. Hecht*, 8 Id. 814, it was held that there could be no acceptance and actual receipt of goods within the seventeenth section unless the vendor had an opportunity of judging whether the goods sent compared with the order. "In my opinion," remarks Martin, B., "an acceptance, to satisfy the statute, must be something more than a mere receipt; it means some act after the vendor has exercised, or had the means of exercising, his right of rejection."

In *Norman v. Phillips*, 14 Mee. & W. 278, the defendant, a builder at Wallingford, gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the Great Western Railway to be forwarded to him at Wallingford, as had been the practice between the parties on previous dealings. The timber was sent, and arrived at Wallingford station April 19th, and the defendant was informed by the delivery clerk of its arrival, and said he would not take it. An invoice was sent a few days after, which the defendant received and kept without making any communication to the plaintiff till May 28th, when he informed him that he declined taking it. It was held that although there might be a *scintilla* of evidence for the jury of the acceptance of the lumber within the statute, yet that there was not sufficient to warrant them in finding that there was such an acceptance, and the court set aside a verdict for the

plaintiff as not warranted by the evidence. "The true line appears to be," says Alderson, B., "that acceptance and delivery under the statute of frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods; as, for instance, if instead of sending the goods back he keeps or uses them. In *Hanson v. Armitage*, 5 Barn. & Ald. 557, H. A., a merchant in London, had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered and accepted by the wharfinger, to be forwarded in the usual manner; but the court held this was not a sufficient acceptance to take the case out of the statute. In *Meredith v. Meigh*, 2 El. & Bl. 364, goods ordered by parol were shipped on board a general ship, consigned to a carrier named by the vendee to forward them, notice being sent to the vendee of the shipment, and the bill of lading being also sent to the carriers, which was not returned, nor was any step taken to repudiate the bargain until after news arrived of the loss of the ship and the goods, and it was decided that there was no sufficient receipt and acceptance of the goods to satisfy the statute of frauds, in the absence of a written contract, and that the vendees were not liable for their price. "I am of opinion," says Lord Campbell, C. J., "that there was no evidence to go to the jury in this case on which they would have been justified in finding that the goods had been accepted and actually received, so as to satisfy the seventeenth section of the statute of frauds."

The language of the statute is unequivocal, and requires the action of both parties. There must be acceptance as well as delivery. The property of the goods must vest in the vendee as their absolute owner, discharged of all lien, and so that he shall be precluded from taking any objection to the quantity or quality of the goods sold: *Shindler v. Houston*, 1 N. Y. 261; *Owtwater v. Dodge*, 6 Wend. 400.

Exceptions overruled.

CONTRACT FOR SALE OF FIVE HUNDRED BALES OF COTTON at a specified price per pound, to be delivered on its arrival before a certain future day, payment to be made on delivery, the cotton to be weighed and tare to be allowed, is an executory contract, and the title does not pass until delivery: *Russell v. Nicoll*, 20 Am. Dec. 670, and note.

DELIVERY AND ACCEPTANCE OF GOODS, SUCH AS WILL TAKE SALE OF THEM OUT OF STATUTE OF FRAUDS, cannot be shown by words; some acts transferring possession are necessary: *Shindler v. Houston*, 49 Am. Dec. 316. In the note to this case the principles of law decided in the principal case are dis-

cussed at length, and *Maxwell v. Brown* is cited, together with a number of similar cases on page 328 of that note. This rule is further discussed in the note to *Arnold v. Delano*, 50 Id. 759, wherein all the previous cases upon this point in this series are cited.

To CONSTITUTE ACCEPTANCE or GOONS, something more than mere words are necessary; there must be some act of the parties amounting to a transfer of the possession, and an actual receipt by the purchaser, so that the seller no longer retains a lien for the price: *Edwards v. Grand Trunk Ry Co. of Canada*, 54 Me. 105. The doctrine of the principal case is discussed by Wood in his work on the statute of frauds, section 305, where the principal case is cited, together with a number of others. See also the same work, sections 308, 317, 333, 335, and 342, where the principal case is cited.

JACOBS v. BENSON.

[39 MAINE, 132.]

PAROL TESTIMONY IS ADMISSIBLE FOR PURPOSE OF CORRECTING MISTAKE IN NAME of a promisee in a promissory note, if there is something found in the note from which, connected with the parol testimony, the promisee is clearly ascertained. The terms of the contract are not thereby varied.

PAROL TESTIMONY THAT ORDER WAS DRAWN IN FAVOR OF PLAINTIFF, THAT MISTAKE WAS MADE in writing his name, and that the order was in his hands, and was accepted as due to him, should be received.

ASSUMPTION upon a certain order of which the following is a copy: "West Minor, April 10, 1849. Mr. W. B. Benson, please pay to Charles B. Jeques, or order, thirty-six dollars cash; charge the same to my account. James Meaney." This was indorsed, "Accepted, July 16, 1849. William B. Benson, by Geo. Gregg." Plaintiff in his writ alleged that his name is Charles V. Jacobs, and that the order was made payable to him as Charles B. Jeques. At the trial plaintiff called the drawer of the order, and he testified that he drew the order, and that he drew it upon the defendant. The plaintiff then offered to prove by this witness that he, the drawer, had intended to draw the order in his favor, that he understood the plaintiff's name to be Charles B. Jeques, that he knew no other person by that name, and that in so writing it he had made a mistake, and also that at the time he drew the order Benson was owing witness a sum of money. The plaintiff then offered to prove by George Gregg that at the time of the indorsement he was the duly authorized agent of the defendant, that the order was presented by the plaintiff for acceptance, and that it was accepted by him for the plaintiff's benefit. The court refused to receive such testimony, and ordered a non-suit.

Gerry, for the plaintiff.

Shepley and Dana, for the defendant.

By Court, SHEPLEY, C. J. The suit is upon an order drawn by James Meaney, in favor of Charles B. Jeques, on the defendant, purporting to be accepted for him by George Grigg. The declaration alleges that the promise was made to the plaintiff by the name of Charles B. Jeques. The case is not one of variance between the contract described in the declaration and the one produced in evidence, as in the case of *Gordon v. Austin*, 4 T. R. 611.

Parol testimony could not be received to vary the contract. It appears to have been offered to prove the allegation contained in the declaration, that the order was drawn in favor of the plaintiff, and that the acceptance was made to him.

The general rule of law is, that a mistake made in the name of a grantee, devisee, or promisee may be corrected by parol testimony. The grant, devise, or contract is not thereby varied. The only effect is to ascertain the true grantee, devisee, or promisee. Yet there must be something found in the grant, devise, or promise from which, connected with the parol testimony, the party beneficially entitled is clearly ascertained. Otherwise he might be arbitrarily designated by parol testimony, without any written evidence indicating that any particular person was intended.

A conveyance was made to Eliza Ann Castin, after she had been married more than a year to Thomas Scanlan, and parol testimony was received to correct the error: *Scanlan v. Wright*, 18 Pick. 523 [25 Am. Dec. 344].

The rules respecting errors in the description of devisees, as well as respecting the description of estates devised, were fully considered in the case of *Miller v. Travers*, 8 Bing. 244. It is there said that parol evidence should be received to correct an error, "where an estate is devised to a person whose surname or christian name is mistaken."

Parol testimony was received to prove that a note payable to Ebenezer Hall was made to a partnership transacting business under that name: *Hall v. Tufts*, 18 Pick. 455.

A note was made to Elizabeth Willison, and an action was brought upon it by Elizabeth Willis. Parol testimony was received to prove that "Willison" was inserted by mistake for "Willis:" *Willis v. Barrett*, 2 Stark. 29.

Some of the testimony offered was not admissible, but testi-

mony to prove that the order was drawn in favor of the plaintiff, that a mistake was made in writing his name, and that the order was in his hands, and was accepted as due to him, should have been received.

Exceptions sustained and nonsuit taken off.

The case of *Cox v. Belthover*, 47 Am. Dec. 145, is in harmony with the principal case. In this case the court say that "a plaintiff suing on a promissory note which purports to be payable to a person of a different name may aver and show by evidence that he was the person intended." In *Newport Mechanics' M. Co. v. Starbird*, 34 Id. 145, the court hold parol evidence admissible to show who were intended as payees by a description in a promissory note. To the same effect is *McKinney v. Harter*, 43 Id. 96. Parol evidence is admissible to show note produced in evidence to be the one secured by a mortgage when it corresponds in some, but not in all, respects with that described in the condition in the mortgage: *Williams v. Hilton*, 58 Am. Dec. 729. The entire subject to which the case relates will be discussed in a note to *Tittle v. Thomas*, in the next volume of this series. See also Daniel on Neg. Inst. sec. 100.

SIMONDS v. HENBY.

[39 MAINE, 155.]

APOTHECARIES AND SURGEONS ARE RESPONSIBLE ONLY FOR INJURIES RESULTING from a want of ordinary care and skill. The highest degree of skill is not required of them.

SKILL REQUIRED OF DENTIST.—An instruction in an action by a dentist for the price of some work, which the defendant complained of as defective, "that if the plaintiff has used all the knowledge and skill to which the art had at the time advanced, that would be all that would be required of him," etc., is erroneous, as requiring the possession of more than ordinary care and skill by him.

ASSUMPTION for the value of a set of teeth furnished to defendant's wife, with his knowledge and assent. After the teeth were finished, the wife complained that they did not fit, and they were altered for her. She still complained that they did not fit, and refused to take them, although plaintiff told her he would claim their price. The evidence conflicted as to whether the teeth fitted or not. Among the instructions given was one which is recited in the opinion. Plaintiff excepted to this instruction. The jury returned a verdict for the defendant.

Barrows, for the exceptions.

Gilbert, contra.

By Court, APPLETON, J. The law implies an undertaking on the part of apothecaries and surgeons that they will use a rea-

sonable degree of care and skill in the treatment of their patients: Chit. Cont. 553. They are held responsible for injuries resulting from a want of ordinary care and skill. The highest degree of skill is not to be expected, nor can it reasonably be required of all.

The instruction given was "that if the plaintiff has used all the knowledge and skill to which the art had at the time advanced, that would be all that would be required of him," etc. It is undoubtedly correct that no more would be required of him. But upon legal principles, could so much be required of him? We think not. If it could, then every professional man would be bound to possess the highest attainments and to exercise the greatest skill in his profession. Such a requirement would be unreasonable.

The instructions given were erroneous, and a new trial must be had.

Exceptions sustained.

New trial ordered.

PHYSICIAN'S OR SURGEON'S IMPLIED CONTRACT WITH HIS EMPLOYER is that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science; that he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge; and that he will use his best judgment as to the treatment of the case intrusted to his charge: *Leighton v. Sargent*, 59 Am. Dec. 388; *Howard v. Grover*, 48 Id. 478, and extensive notes to each of those cases discussing the entire subject. In these notes the subsequent main decisions upon this question are cited, and the authority of *Simonds v. Henry* sustained.

NEWBEGIN v. LANGLEY.

[39 MAINE, 200.]

DEED AND MORTGAGE BACK, ALTHOUGH BEARING DIFFERENT DATES, IF DELIVERED AT SAME TIME, constitute but one transaction. Consequently the deed and mortgage must stand or fall together; they cannot be void in part and good in part.

IN PROCEEDINGS UPON WRIT OF ENTRY, WHERE IT APPEARS that the defendant conveyed the disputed premises to a married woman, and took her note and mortgage back, the whole amounting to a single transaction, he is entitled to recover, the note and mortgage being void.

NON-TENURE CANNOT BE PLEADED IN BAR, AND ONLY IN ABATEMENT WITHIN TIME required by the rules of court.

Writ of entry. Defendants pleaded the general issue. Jane C. Langley, by brief statement, stated that at the execution of

the mortgage mentioned in the opinion she was a married woman, and so continues to be, and that the disputed premises are her own freehold. Cole, the other defendant, stated that he was the lessee and tenant of Jane C. Langley, who was the owner of the premises.

Emery and Loring, for the tenant.

J. M. Goodwin, for the defendant.

By Court, Rice, J. The defendant conveyed the premises, by deed dated February 27, 1851, to Jane C. Langley, one of the defendants, who then was and still is a married woman; and said Langley reconveyed the same in mortgage to the defendant, by deed dated April 5, 1851, to secure the payment of her promissory note given in payment for the premises in controversy. These deeds, though of different dates, were delivered at the same time, and in law constitute one contract: *Holbrook v. Finney*, 4 Mass. 566 [3 Am. Dec. 243]; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Id. 89 [19 Am. Dec. 194]; *Bigelow v. Kinney*, 3 Vt. 359 [21 Am. Dec. 589].

These deeds become operative, if at all, from the time of their delivery: *Harrison v. Phillips Academy*, 12 Mass. 456; *Dana v. Coombs*, *supra*. The deed and mortgage, being one contract, must stand or fall together. They cannot be void in part and good in part: *Richardson v. Boright*, 9 Vt. 368; *Roberts v. Wiggin*, 1 N. H. 78 [8 Am. Dec. 38], and cases above cited. The promissory note of a married woman, in this state, at the date of this transaction, was absolutely void: *Howe v. Wildes*, 34 Me. 566.

It is a general rule (the exceptions to which do not apply in this case) that the deeds of married women are void: 2 Bright's H. & W. 38; Greenl. Cru., tit. Deed, c. 11, sec. 25; Hill's Abr., c. 25, sec. 49; *Page v. Page*, 6 Cush. 196; *Shaw v. Russ*, 14 Me. 432; *Fowler v. Shearer*, 7 Mass. 14.

It was suggested in the argument, by counsel for the defendant, that the two deeds might be construed as one deed upon condition subsequent. If they were to receive that construction, the tenants would be entitled to judgment, as the defendant exhibits no right of entry for condition broken. The whole contract is more analogous to a deed from a defendant with condition precedent unperformed. But they do not constitute a deed upon condition, but a deed with a defeasance: Greenl. Cru., tit. Deed, c. 7, sec. 25.

Both the defendants have pleaded the general issue, with brief statements, which, though not in form, are in substance

pleas of non-tenure. In all writs of entry, the defendant may plead that he is not tenant of the freehold in abatement, but not in bar: Stats. 1846, c. 221. These pleas cannot avail as pleas in abatement, being informal, and not having been filed within the time prescribed by the rules of the court, and they are not authorized as pleas in bar.

The defendant must have judgment.

DEED AND MORTGAGE BACK CONSTITUTE BUT ONE TRANSACTION, and if the mortgage was void at its execution, or is afterwards avoided, the mortgagee being an infant, the deed must share its fate: See cases collected in note to *Manning v. Johnson*, 62 Am. Dec. 732.

THE PRINCIPAL CASE IS CITED in *Dunning v. Pike*, 48 Me. 461, where the court decide that where a married woman purchases real estate and gives her promissory notes in payment, with a mortgage as security, the notes and mortgage given by her, and the deed given to her, are all void, the whole being one transaction, though the conveyances were made at different times, and the parties were different, yet all done in pursuance of a mutual agreement. But in *Brookings v. White*, 49 Id. 479, this question underwent an extensive discussion, and the authority of the principal case was denied, the court holding that a married woman may execute a valid mortgage of her separate estate; this, although the promissory notes secured by it were void. This latter decision turned upon a statutory construction.

PIERCE v. ROBIE.

[39 MAINE, 205.]

TRUSTEES OF VOLUNTARY BENEVOLENT ASSOCIATION, WHOSE FUNDS ARE RAISED BY VOLUNTARY CONTRIBUTION of its members, may maintain a suit upon a note, although the makers thereof were members of the association.

WHERE NOTE GIVEN TO ASSOCIATION IS MADE PAYABLE TO TRUSTEES THEREOF OR THEIR SUCCESSORS, such successors may, at the request of the association, maintain a suit upon it in the name of the former trustees; and such former trustees, as plaintiffs of record, have no power to dismiss the suit, but they may require protection from costs.

WORDS "TRUSTEES," ETC., AFTER PROMISEES' NAMES in a note are merely *descriptio persona*.

ASSUMPTION upon a note, which provides that "for value received, we, Frederick Robie as principal, and T. P. S. Deering as surety, jointly and severally promise to pay Morris E. Palmer and William Pierce, trustees of York Tent, or their successors in office, the sum of fifty dollars," etc. At the time of the trial it appeared that the York Tent was managed by a board of officers known as trustees, whose duty it was to manage its funds, invest the same, turn over the books and accounts to

their successors, etc.; that it was a benevolent voluntary association, and that its funds were raised by voluntary quarterly contributions of its members. At the time the suit was commenced Moore and McKenney were the trustees, and they had been authorized by a vote of the association to collect all sums due the York Tent. The plaintiffs of record gave to the defendants a release of all demands on account of this suit, denying that they had authorized it, and requesting the court to discontinue it. This was introduced in evidence by the defendants. The defendant asked the court to instruct the jury that if they believed the above release by Pierce and Palmer was made in good faith, then their verdict should be for the defendant; and second, that if they believed that the plaintiffs were joint creditors with others of defendant Robie, then that they had authority to release the suit, and the verdict should be for defendant. The court refused to give these instructions, and instructed the jury, substantially, that if they believed the York Tent association existed, that its affairs were managed by a board of trustees, that Moore and McKenney were such trustees at the commencement of this suit, that the authority of Pierce and Palmer had ceased and that Moore and McKenney were their successors, that the note was the property of the York Tent, and that Moore and McKenney had been instructed to collect the note by this suit—then, that this suit could be prosecuted in opposition to the objections of Pierce and Palmer. Defendant excepted to this ruling, and the verdict being against him, appealed.

Luques, for the exceptions.

Goodwin, contra.

By Court, Rice, J. The York Tent is a benevolent voluntary association. Its funds were raised by voluntary contribution of its members, and by the organic rules of the association were under the exclusive management of trustees, in whose name they were invested. The plaintiffs, at the date of the note, which is payable to them or their successors in office, were trustees of the association. The defendant, at the time the note was given, was also a member of the association, and borrowed of its funds the amount of money for which the note was given. At the time this action was brought, the plaintiffs had ceased to be trustees, and were succeeded in that office by Moore and McKenney, who, under instructions from the association, caused this action to be brought. These facts are either conceded by the parties or found by the jury.

At a term of the court prior to the trial, on motion of the defendant, Moore and McKenney were required to and did indorse the writ as assignees of the note in suit.

After the action had been for some time pending in court, the defendant procured releases from the plaintiffs of record, in which said plaintiffs disavow and disown this suit, and request that it may be discontinued, and state that they are not aware that they have assigned the note to any person.

The case is now before us on exceptions, and a motion for a new trial on the ground that the verdict is against law and evidence.

The first requested instruction was properly refused. The true question was whether the plaintiffs had a right to release the defendant and discharge the writ, not whether they acted in good faith. They may have acted honestly but erroneously.

It is not the duty of a judge to give instructions upon a point purely hypothetical. Such instructions would tend to divert and distract the attention of a jury, and be productive of injury rather than benefit. Reference must always be had to the existing state of the proof to determine whether instructions requested or given are proper or otherwise.

The funds of the association, as the evidence fully shows, were under the sole management and control of the trustees. In them was vested the legal title, held, it is true, in trust for the benefit of the association. That association is neither a corporation nor a copartnership; its members, therefore, who are not trustees, though they may have a beneficial interest in the funds of the association as members, are not for that reason legally the joint creditors of the defendant. The nominal plaintiffs could not, therefore, discharge the defendant simply because they were members of the same association. In their capacity as members they have no control over the funds.

The right of the nominal plaintiffs to control this action, if any they have, arises by virtue of their being parties. The promise was to them, and their control over this suit was absolute, unless their authority had been determined by the expiration of their term of office. The second request was therefore properly withheld.

The questions raised by the instructions given were, whether the action was properly brought in the name of the plaintiffs; and if so, whether, by their release to this defendant, the action was discharged.

The note is in terms payable to the plaintiffs; the promise is to them. The conditional words "trustees of the York Tent"

are merely *descriptio personarum*: *Innell v. Newman*, 4 Barn. & Ald. 419; *Binney v. Plumley*, 5 Vt. 500 [26 Am. Dec. 313]; *Ingersoll v. Cooper*, 5 Blackf. 426; *Clap v. Day*, 2 Me. 305 [11 Am. Dec. 99].

The jury have found that the plaintiffs of record had ceased to be trustees. With the expiration of their office their legal right to control the note expired. The note is found in the hands and under the control of Moore and McKenney, their successors in office. By the act of succession they are to be treated, so far as a right to control the property of the "tent" is concerned, as the equitable assignees of the plaintiffs: *Ingersoll v. Cooper*, 5 Blackf. 426. They had the possession of the note, and were exercising control and dominion over it. This is evidence of ownership: *Harriman v. Hill*, 14 Me. 127.

There is no suggestion that the defendant has ever paid this note, nor that he did not receive a full consideration therefor at its inception. On his motion the trustees, who are now prosecuting this suit, have indorsed the writ as assignees, under the provisions of the statute. He was therefore secured by having a responsible party to whom he might look for his costs, if he had succeeded in his defense.

The plaintiffs of record do not suggest, as a reason for desiring to discontinue this suit, any apprehension of being subjected to costs. Had that been the fact, the court would have seen that they were amply protected from any loss. In reviewing this case, we think the remarks of the court in the case of *Harriman v. Hill*, *supra*, are particularly appropriate when they say: "In the case before us, we are satisfied that the defense set up is without merits, and is an attempt to escape from the obligation of a promise fairly made, upon a legal and adequate consideration. And we are further satisfied that the course taken by the nominal plaintiffs is inequitable on their part; that they are in no danger of sustaining loss or injury, and that they have nothing to gain by the suppression of this suit, or its termination in favor of the defendant."

We do not think that the case at bar is favorably distinguished, for the defendant, from the case above cited, by the consideration that he is attempting to withhold funds which he has borrowed from a charitable association, and which were accumulated by voluntary contributions for benevolent purposes, by a defense founded, at best, upon legal technicalities, not to designate it by any harsher name.

The court did not err in admitting the witness Andrews: *Pond v. Hartwell*, 17 Pick. 272.

We do not perceive any error in the instructions given, and think the verdict is sustained by the evidence, and is in conformity with both the law and the equity of the case.

Exceptions and motion overruled.

Judgment on the verdict.

ACTION OF ASSUMPSIT WAS HELD MAINTAINABLE by the town of Arlington upon a note of the following tenor: "Arlington, September 27, 1808. For value received, I promise to pay Luther Stone, town treasurer, or his successors in office, eighty-four dollars and twenty-seven cents." The maker of this note was a resident of the town: *Arlington v. Hinds*, 12 Am. Dec. 704. To this case is appended a note extensively discussing its principles. An action is maintainable in the individual names of trustees or their survivors, where a note is payable to the "trustees, or their successors," of an unincorporated company: *Davis v. Garr*, 55 Id. 387, and note.

"CASHIER," SUBJOINED TO NAME OF PARTY in whose favor a bill of exchange has been accepted, is a mere *descriptio persona*: *Ross v. Laffan*, 42 Am. Dec. 376; the word "trustees" was also held to be a designation of persons, in *Davis v. Garr*, 55 Id. 387.

ROCKINGHAM MUTUAL FIRE INS. CO. v. BOSHER.

[39 MAINE, 253.]

NO ACTION LIES BY INSURANCE COMPANY, IN ITS OWN NAME, AGAINST THIRD PERSON, who willfully burns up property insured by it, to recover the amount of money which it was thereby occasioned to pay to the insured.

PAYMENT TO OWNER BY INSURANCE COMPANY OF AMOUNT OF HIS LOSS DOES NOT BAR the right against another party originally liable for the loss, but the owner, by receiving payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name.

TRESPASS ON THE CASE. The opinion states the case.

Clifford and Goodwin, for the demurrer.

Eastman and Leland, contra.

By Court, TENNEY, J. This action is trespass on the case for the recovery of money paid by the plaintiffs to one Shannon, on their policy of insurance against damage by fire on a store in the town of Saco, and merchandise therein, alleged to have been damaged from a fire willfully and maliciously kindled by the defendant for the purpose of injuring the said Shannon and the plaintiffs. The defendant filed a general demurrer to the declaration, and the parties agree to submit the question whether the action can be maintained in the name of the company.

The contract of insurance is one of indemnity between the

parties thereto; and, so far as the question before us arises, it does not differ essentially from other contracts of indemnity or guaranty. "When the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity which he holds for the common benefit to the insurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction:" *Hart v. Western R. R. Corporation*, 13 Met. 99.

By the contract of insurance, in the case of loss, the assured having a claim upon the underwriters to bear the whole or a part of it for him, according to the terms of the policy and the extent of the loss, the privity is between the parties to that contract alone. And payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name. This principle is recognized in *Randal v. Cockran*, 1 Ves. sen. 98; *Mason v. Sainsbury*, 3 Doug. 61; *Yates v. Whyte*, 4 Bing. N. C. 272; *Clark v. The Hundred of Blything*, 2 Barn. & Cress. 254; *Cullen v. Buller*, 5 Mau. & Sel. 466; and in *Hart v. Western R. R. Corporation*, 13 Met. 99. In the case of *Mason v. Sainsbury*, *supra*, which was an action to recover damages caused by the mob, brought upon the riot act against the hundred, the plaintiff had an insurance on the property injured, and had received payment for the loss of the insurers. The action was in the name of the owner, by his consent, for the benefit of the underwriters. Lord Mansfield and the whole court held the action maintainable. Buller, J., is reported to have said: "It was to be treated as an indemnity, in which the principle is, that the insured and the underwriter are as one person." And Parke, J., in *Yates v. Whyte*, 4 Bing. N. C. 272, says: "It has been laid down by text-writers that when the assured has been indemnified for a wrong, recovers from the wrong-doer, the insurers may recover the amount from the assured. In *Randal v. Cockran*, *supra*, it was said they had the clearest equity to use the name of the assured."

An attempt was made in the case of *The London Assurance Co. v. Sainsbury*, 3 Doug. 245, by the office which, having paid the assured the amount of the loss sustained by him in consequence of a demolishing by rioters, sued the hundred, under the statute of 9 Geo. I., stat. 2, c. 5, sec. 6, in its own name. But it was held by Lord Mansfield and Buller, Willes and Ashurst, JJ., dissenting, that the office was not entitled to recover, and judgment was given for the defendants, which was unanimously affirmed in the court of exchequer chamber: 2 Phill. Ins., 2d ed., 607. This case has not been overruled by any cited for the plaintiffs, or which we have been able to find. And the reason of the doctrine of the cases in which it was held that an action may be maintained in the name of the owner, as the trustee of the insurer, who has paid the loss, against the wrong-doer or party first liable as principal, is wholly inconsistent with the principle that the insurer can in his own name recover for money paid on the contract of insurance in an action against the wrong-doer. For the insurer and assured being in effect one person, each cannot maintain an action at the same time and for the same loss, where there can be but one satisfaction.

But the plaintiffs rely upon the provisions of the revised statutes, chapter 162, section 13, that if any person shall willfully or maliciously injure, destroy, or deface any building or fixture thereto, not having the consent of the owner thereof, or willfully or maliciously destroy, injure, or secrete any goods or chattels, etc., he shall be punished, etc., and shall also be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured, in an action of trespass. A little consideration will alone be sufficient to satisfy the mind that this provision cannot be construed so as to give a right of action to a party who had none before at common law. It was designed to increase the liability in the amount to be recovered of one who should willfully or maliciously destroy, injure, or deface, or secrete the property of another person by the owner thereof, and not by the one who should have no interest in the property, but who might be remotely prejudiced by virtue of some contract with the owner.

The damages to be recovered are clearly designed to be for the loss of the property itself, and not for that which was the indirect consequence of that loss. Damages to be recovered are measured by the value of the property destroyed or injured alone. The loss or diminution in the value of the property may be greater than that which the insurer may be obliged to

pay under the contract of insurance. But the underwriter, if he can recover at all, is not restricted in his damages to the simple amount paid by him to the assured, for the money so paid is not the property destroyed or injured, but he is entitled to damages equal to three times the value of that property. And when the wrong-doer has satisfied a judgment for the damages to that amount in favor of the underwriter, he is discharged from all further liability; and it is not perceived in what mode the owner can obtain remuneration for his loss above the simple sum paid by the insurer. The proposition which might lead to such consequences cannot be admitted.

Demurrer sustained.

Declaration adjudged bad.

AFTER PAYMENT OF LOSS BY INSURER, HE IS ENTITLED TO BE SUBROGATED to the rights of the assured against third persons to reimburse himself for such loss: *Etna Fire Ins. Co. v. Tyler*, 30 Am. Dec. 90, and note 102, collecting a number of cases; also *Millardon v. Western etc. Ins. Co.*, 29 Id. 433; *Wiggin v. Suffolk Ins. Co.*, 29 Id. 576; *Alliance M. A. Co. v. Louisiana etc. Ins. Co.*, 28 Id. 117, and extended note 121.

NORRIS v. ANDROSCOGGIN R. R. CO.

[*29 MAINE, 273.*]

ACT OF LEGISLATURE WHICH PROVIDES FORFEITURE OF ONE HUNDRED DOLLARS BY ALL RAILROADS neglecting to erect and maintain certain fences along their line of road, being a remedial act passed for the protection of property peculiarly exposed by the introduction of railroads, applies to corporations existing before its passage.

WHERE RAILROAD COMPANY NEGLECTS TO MAINTAIN PROPER FENCES AND ERECT CATTLE-GUARDS along the line of their road, as a matter of law there is that neglect which will render the corporation liable for injuries arising solely from that cause.

WHERE RAILROAD IS REQUIRED TO INCLOSE ITS ROAD BY GOOD AND SUFFICIENT FENCE WHERE IT PASSES through improved lands, and it neglects to do so, and horses and other animals, in consequence of this omission, stray upon the track and are killed or injured by the engine or appendages, the company is liable in damages. This, although the engineer exercised due care.

RAILROAD COMPANY BOUND TO KEEP FENCES ALONG ITS ROAD IN REPAIR, after a portion of the same has been down for several days, is presumed to have had notice of the fact.

FACT THAT PLAINTIFF, IN ACTION AGAINST RAILROAD COMPANY FOR INJURIES TO HIS HORSE occasioned by their fence being out of repair, originally built the fence for them in an imperfect manner does not excuse them from liability.

Action on the case, brought to recover damages for injuries done to a horse. The defendants' railroad was built through plaintiff's improved land, and by his pasture, and through a gap in the fence past the latter, the horse escaped upon the track of defendants' and was injured by the engine. The testimony showed that several days prior to the injury the above-mentioned gap in the fence had existed; that at the time the injury occurred the engineer of the train was exercising due care; and that about two years before the plaintiff had himself built the fence for the defendants and had been paid therefor. The full court was authorized to render the proper judgment.

May, for the defendants.

Ludden, for the plaintiff.

By Court, TENNEY, J. By the charter of the defendants, chapter 184, section 11, of the special laws of 1848, they are required to keep and maintain legal and sufficient fences on each side of their railroad when the same passes through inclosed lands, or lands improved, or lands that may be improved afterwards, and for the neglect of this duty they are liable to pay a fine sufficient to erect and repair the same.

By the statute of 1853, chapter 41, section 20, a neglect in any railroad company, which is bound by the provisions of its charter to make or maintain fences bordering on its road, when by such neglect the owner of the land through which the railroad passes is liable to suffer damages, after certain proceedings by the owner of the land subjects the company to the forfeiture of the sum of one hundred dollars for each month it shall neglect to make and maintain the fence, to be paid to the owner of the land. This statute was enacted after the act of incorporation of the defendants. But it being one of those remedial acts passed for the effectual protection of property peculiarly exposed by the introduction of the locomotive-engine, applies to corporations existing before its passage: *Lyman v. Boston etc. R. R. Co.*, 4 Cush. 288.

A railroad company, as passenger carriers, are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of passengers: *McElroy v. Nashua etc. R. Corp.*, 4 Cush. 400 [50 Am. Dec. 794]. And for the security of persons or property exposed to injury by being upon or near the railroad track at the time of the passage of the engine, the principles of

the common law require that the agents of the company shall exercise common and ordinary care; and if they are guilty of neglect in this, and damages are occasioned to individuals in consequence, the company will be liable, notwithstanding the injured party may be a wrong-doer in being upon the railroad.

In Vermont, where railroad companies are not required by statute provisions to make and maintain fences on each side of the land taken by them for the road, the court say, in the case of *Trow v. Vermont Central R. R. Co.*, 24 Vt. 488 [58 Am. Dec. 191]: "The duty of maintaining fences and erecting cattle-guards is imposed on the corporation, not only as a matter of safety in the use of their roads and running their engines thereon, but also as matter of security to the property of those living near and contiguous to the road. And this arises from the consideration that they must know and reasonably expect that without such precautions such injuries will naturally and frequently arise. And where for the distance mentioned in this case no precautions of that kind were used upon the road, and in a place so public and common, we think, as a matter of law, there was that neglect which will render the corporation liable for injuries arising solely from that cause."

And where the charter of the company and the general statute provide for the safety of property, not in the transportation thereof upon the railroad, but, being in an exposed situation in its vicinity, by certain requirements, and by the neglect of these requirements the property is destroyed or injured by the engine upon the road, the liability cannot be denied. If the charter imposes upon the company the obligation, at certain crossings, to place men to guard the passages across the track, and to prevent persons or domestic animals from passing when the trains are approaching, and this requirement should be neglected, to the injury of a party from the engine, no doubt could be entertained that compensation for such injury could be legally claimed. And where it is required, for a like object, that the railroad passing by improved land shall be inclosed by a good and sufficient fence, and this shall be neglected by the company, and horses or other animals, in consequence of this omission, stray upon the track, and are killed or injured by the engine or its appendages, the company is liable in damages. In such case it is a neglect to construct the road in the manner prescribed, for the very purpose of giving to the owners of this kind of property the security designed, and the omission is the proximate cause of the damages sustained: *Sharrod v. London & W.*

R. R. Co., 6 Railway and Canal Cases, 245. The owner of the contiguous improved land is entitled to remuneration for his losses so occasioned, equally with the passenger in the cars who should be injured by reason of the omission of the company to construct the road in the mode required. As such defect was the cause of the injury, the great moderation with which the engine was driven, the extreme care of the engineer and the agents in attendance, would be no answer to the claim for damages received.

In the case before us, the company was guilty of a neglect in suffering the fence between the plaintiff's pasture and the railroad to be out of repair for several days. It is not exonerated from liability, as by the throwing down of the wall immediately before the escape of the plaintiff's horse, if such would excuse it; for it is presumed to have had ample notice of the defect. It was not the duty of the plaintiff to be upon the lookout to see if the fence was entire, as it was not required of him to make or to maintain it; and there is no evidence that he had knowledge of its condition when the injury took place.

The defendants were wrong-doers, and no fault is attributable to the plaintiff. The injury to the horse was the consequence of a disregard of an express requirement of the law, and the company must answer in damages, unless they are relieved by other facts which appear in the case.

The fact that the plaintiff originally constructed the fence for the company is no defense. He received payment for that service, without objection, and his acts therein became the acts of the company. If he had constructed an insufficient fence, after its adoption by the company his defaults cannot be set off against the liability of the other party.

The objection to the sufficiency of the writ cannot avail the defendants. It does not purport to be an action by authority of any statute provision, such as is provided by the revised statutes, chapter 25, section 89, but is an action at common law, though the liability of the company may arise by reason of its charter and statutory provisions.

Defendants defaulted.

RETROSPECTIVE LAWS ARE CONSTITUTIONAL when remedial in their nature, and when they do not infringe upon or divest vested rights: *Wynne's Lessee v. Wynne*, 58 Am. Dec. 66. Remedial legislation is constitutional, though exercised over past contracts: *Baugher v. Nelson*, 52 Id. 694, and numerous cases cited in note page 702. As to the constitutionality of retroactive statutes generally, see *Greenough v. Greenough*, 51 Id. 567, and note; *Boston v. Cummins*, 60 Id. 717; *Bruce v. Schuyler*, 48 Id. 447; *Rawls v. Kennedy*, 58 Id. 289.

NEGLECT TO CONSTRUCT FENCES AND CATTLE-GUARDS, in Vermont, renders a railroad corporation liable for injuries arising solely from that cause, when the omission was for a considerable distance in a place so public and common that it must know and reasonably expect that without such precautions injuries to horses and cattle will naturally and frequently arise: *Trow v. Vermont Central R. R. Co.*, 58 Am. Dec. 191. The care and diligence required of a railroad company in keeping its fences in repair depend upon the places through which it passes: *Id.*; consequently it is not negligence for a railroad company to fail to fence its line where it runs through common vacant and uninclosed lands: *Perkins v. Eastern R. R. Co.*, 50 Id. 589. A provision in the charter of a railroad company requiring it to fence its track is for the benefit of the adjoining land-owners only, and merely places the company in the position of a proprietor who is bound by contract or prescription to build the fences between himself and an adjoining proprietor: *Jackson v. Rutland etc. R. R. Co.*, 60 Id. 246.

In Pennsylvania railroad companies are not bound to fence their roads: *Railroad Co. v. Skinner*, 57 Am. Dec. 654. So in Kentucky, the grantor of a right of way to a railroad company through his property is not bound to fence the same, nor is the company under legal obligation to do so: *Louisville R. R. Co. v. Milton*, 58 Id. 647.

RAILROAD COMPANY'S LIABILITY FOR KILLING ANIMALS ON ITS TRACK: See *Louisville R. R. Co. v. Milton*, 58 Am. Dec. 647; *Danner v. S. C. R. R. Co.*, 55 Id. 678; *Williams v. Michigan Central R. R.*, *Id.* 59; *Trow v. Vermont Central R. R. Co.*, 58 Id. 191; *Railroad Co. v. Skinner*, 57 Id. 654; *Jackson v. Rutland etc. R. R. Co.*, 60 Id. 246; *Vandegrift v. Rediker*, 51 Id. 262; *Perkins v. Eastern R. R. Co.*, 50 Id. 589, and the numerous cases cited in the notes thereto.

THE PRINCIPAL CASE IS CITED to the point that it is the duty of a railroad company to maintain substantial and sufficient fences along its track, and that it is liable for its neglect to do so, in *Wyman v. Penobscot & K. R. R. Co.*, 46 Me. 162.

BURNHAM v. ELLIS.

[*39 MAINE, 319.*]

DECLARATIONS OF AGENT WHILE IN TRANSACTION OF BUSINESS WITHIN SCOPE of his agency are as binding on his principal as if made by him.

DECLARATIONS OF AGENT WHICH RELATE TO PAST, OR ARE MERE RE-CITAL of what has been done, are not admissible against his principal, although his agency existed at that time and still continues.

TRESPASS quare clausum fregit. Defendant pleaded the general issue, also that the acts, if done, were done under license from the plaintiff. Evidence was introduced to show that plaintiff's brother, Daniel Burnham, was his agent for years before the suit, and still was such agent, and defendant was allowed to prove, over plaintiff's objection, that Daniel had stated to witness that defendant had come to him, and that he had given him license to go on the close and commit the acts alleged as tre-

pass. The verdict was for defendant, and plaintiff takes the case here upon his exceptions to the introduction of the above evidence.

Linscott and J. S. Abbott, for the exceptions.

Whitcomb and Belcher, contra.

By Court, APPLETON, J. It was in evidence that Daniel Burnham was the general agent of the plaintiffs, having the control and management of the township upon which the trespass set forth in the declaration is alleged to have been committed. The contracts of an agent within the limits of his authority, and his declarations while in the transaction of business confided to his charge, are as binding on his principal as if made by him.

In the case before us, the statements of the agent do not appear to have been made by him while in the exercise of his delegated authority. They relate to the past, and must be considered as a mere recital of what had been done. The principal is not to be injuriously affected by the declarations of one who may be his agent, if in making them he was neither acting nor claiming to act as such agent. To hold the principal as bound by them would be to regard the agency as extending, not merely to the powers directly given, but as conferring by implication the further power of binding the principal by anything he might choose to say about his past transactions as agent. The assertion of a fact in a casual conversation, in no way connected with the business of the principal, though made by an agent, must be viewed in the same light as if made by any other individual. The principal may make such statements about his own affairs as he may deem expedient, because they are his own. But the declarations of an agent, not made in the transaction of the business of his principal, cannot be received as evidence against him. He is agent for no such purpose.

It does not appear that the statements received were made under such circumstances as could either legally or equitably bind the plaintiff. The agent is a competent witness, and either party can obtain his testimony. In such case, the rights of the parties will be guarded by the securities which are afforded by the sanctions of an oath and the searching interrogatories of a cross-examination.

Upon principle, as well as by the uniform current of decisions, the testimony received must be regarded as hearsay, and legally inadmissible: Story on Agency, sec. 184, etc.; 1 Greenl. Ev., sec. 113.

Exceptions sustained.

New trial granted.

DECLARATIONS OF AGENT WHILE ACTING AS SUCH, and within the scope of his authority, are evidence against his principal: *Stockton v. Demuth*, 32 Am. Dec. 735. The declarations must be part of the *res gestae*: *Innis v. Steamer Senator*, 54 Id. 305; and they are inadmissible as part of the *res gestae* when not made by the agent in discharge of his duties as such: *Mader v. Brown*, 52 Id. 303. An agent's declarations are admissible against his principal only when made in regard to a transaction, then pending, in which the agent is acting within the scope of his authority: *Stiles v. Western R. R. Co.*, 41 Id. 486; *Cunningham v. Cochran*, 52 Id. 230; *Moore v. Bettis*, 53 Id. 771; *Franklin Bank v. Pennsylvania etc. Co.*, 33 Id. 687. The declarations and admissions of an agent after the determination of his authority are not evidence against his principal: *Reynolds v. Rowley*, 38 Id. 233; *Franklin Bank v. Pennsylvania etc. Co.*, *supra*; nor after the fact to which his authority extends: *Whiteford v. Burckmeyer*, 39 Id. 640. This subject is discussed at length in the note to *Moore v. Bettis*, 53 Id. 773.

THE PRINCIPAL CASE IS CITED to the point that the declarations of agents as to past transactions are not admissible, in *Fairfield v. Oldtown*, 73 Me. 573-579.

EMERY v. FOWLER.

[*39 MAINE, 226.*]

FORMER JUDGMENT IN ACTION OF TRESPASS AGAINST DEFENDANT'S PRINCIPAL may be pleaded in bar to an action against defendant, as agent, for the same acts of trespass.

TECHNICAL RULE, THAT FORMER JUDGMENT CAN ONLY BE PLEADED IN BAR between parties to the record or their privies, expands so far as to admit of its being so pleaded when the same question has been decided and judgment rendered between parties responsible for the acts of others.

FORMER JUDGMENT MAY BE INTRODUCED IN EVIDENCE UNDER GENERAL ISSUE, when such judgment was rendered subsequent to the entry of such plea of the general issue.

PAROL EVIDENCE IS ADMISSIBLE UPON TRIAL OF ACTION OF TRESPASS TO show that the same acts of alleged trespass had been directly put in issue, and that a decision upon them had been made in a former suit in a trial upon the merits.

TESTIMONY OF DECEASED WITNESS ON FORMER TRIAL IS ADMISSIBLE ONLY where the witness can state the substance of his whole testimony, and state the whole of the ideas communicated to the jury by his testimony.

TRESPASS *quare clausum fregit* against Charles A. Fowler, to which was pleaded the general issue. The action was originally brought and tried before a magistrate in 1850, and an appeal taken to the supreme court. On the trial in the latter court, after the plaintiff had introduced his case, plaintiff offered to prove by the witnesses introduced that the acts of trespass introduced by plaintiff in support of this action were the same acts testified to and relied upon by him in a former action of

trespass against Nathan Fowler, who was sought to be charged as the principal of this defendant. In this last-mentioned action judgment was rendered in favor of Nathan Fowler, who was this defendant's father. The remaining facts appear from the opinion.

Drummond and Evans, for the exceptions.

Abbott, contra.

By Court, SHEPLEY, C. J. This was an action of trespass *quare clausum*, commenced and tried before a justice of the peace. The defendant, having appealed, offered on trial in this court to prove that the plaintiff, on trial of an action of the like kind between him and Nathan Fowler, introduced proof of the acts of this defendant, now relied upon as acts of trespass committed by him, and proof that they were committed by him as the servant of Nathan Fowler, who then admitted that this defendant was his minor son and servant. This testimony was excluded.

It is insisted that the testimony was admissible, although the parties named in the former and the present suit were not the same.

When a former judgment upon the same matter should be admitted in another suit between the same parties, or between parties in interest not named in the record, such as servants and agents of the parties named, has been discussed by the elementary writers on evidence. This case requires that a single point only should be considered, whether one who acts as the servant of another, in doing an act alleged to have been a trespass, is to be considered as so connected with his principal, who commanded the act to be done, that what will operate as a bar to the further prosecution of the principal will operate as such for his servant. If the action were brought against the servant, he could be permitted to prove that he acted as the servant of another, who commanded the act and was justified in the commission of it, or who, if the act were unlawful, had made compensation for it, either before or after judgment; and his defense would be complete. It is not perceived why he may not, upon the same principles, be permitted to prove that the plaintiff had commenced a suit against his principal for the same cause of action, and proved the acts of his servant as material to the issue tried between them, and that a judgment upon the merits had been rendered against him. In such case the principal and servant would be one in interest, and would be

known to the plaintiff to be so. To permit a person to commence an action against the principal, and to prove the acts alleged to be trespasses to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule, that a judgment can only be admitted between the parties to the record or their privies, expands so far as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others. A familiar example is presented in suits against a sheriff or his deputy, which being determined upon the merits against or in favor of one will be conclusive upon the other.

In the case of *Ferrers v. Arden*, Cro. Eliz. 668, an action of trover appears to have been commenced by the plaintiffs against Simon Wagnal and two other persons for taking an ox, who justified the taking as servants of the defendant and obtained a judgment in their favor. That judgment was pleaded in bar by the defendant, with the necessary averments to show the cause of action to be the same, and it was held to be a bar, and that the plaintiff should not have his action against the defendant, "although he be a stranger to the record, whereby the plaintiffs were barred, yet he is privy to the trespass, wherefore he may well plead it and take advantage thereof."

The case of *Kitchen v. Campbell*, 3 Wils. 304, was an action for money had and received. The defendant, being a creditor of Anderson, a bankrupt, had entered up a judgment against him by virtue of a warrant to confess judgment, and had caused the sheriff, by virtue of an execution issued upon it, to levy on the goods of Anderson after he had become a bankrupt. The plaintiffs, as assignees of Anderson, had brought an action of trover against the sheriff and the defendant for the conversion of those goods, in which the defendants in that suit had obtained a verdict and judgment. The plaintiffs then brought their action against the defendant for money had and received, claiming the money received by him on sale of those goods. The former judgment was held to be a bar.

In the case of *Kinnersley v. Orpe*, 1 Dong. 517, a principal and his servants were regarded as so completely one in interest in actions of tort, that a judgment against one of them was admitted as evidence against another, the plaintiff in both being the same.

on the ground that the principal was the party in interest, and the real defendant in both cases.

In the case of *Strutt v. Bovingdon*, 5 Esp. 56, the record of a suit by the same plaintiffs against Bovington alone was admitted in a suit against him and two others, on the ground that the two other defendants justified as his servants, showing the actual parties in interest to be the same.

The case of *Thurman v. Wild*, 11 Ad. & El. 453, was trespass *quare clausum*. The defendants pleaded that they committed the acts alleged to be trespasses as the servants of P. B. Barry, and delivered possession of the close to him; that the plaintiff entered and expelled Barry, who commenced a suit against him therefor, which, with all other trespasses on the premises, was compromised by the parties upon certain terms set forth in the plea, which were accepted by the plaintiff in satisfaction. Judgment was entered for the defendants.

In the case of *Rogers v. Haines*, 3 Greenl. 362, it was decided that the record of a judgment in a suit, Thomas Clark against James Rogers, was admissible in a suit by James Rogers against Reuben Haines, who claimed to have had an equitable interest in the notes which were the cause of action in the first suit.

In the case of *White v. Philbrick*, 5 Greenl. 147, it was decided that proof that the plaintiff had recovered a judgment in an action of trover against a judgment creditor for seizure of his goods on an execution against one Levi Barrett was receivable to prevent a recovery by the plaintiff against the officer who had seized them on the execution by direction of the creditor.

It will be perceived that under the term "parties to an action" have been included, not only the persons named and privies in law, but those persons whose rights have been legally represented by them. In this case the defendant could legally represent the rights of Nathan Fowler by proving that the acts alleged to be trespasses were committed by him as his servant, and by his direction; and Nathan Fowler could in the former trial have legally represented the defendant by like proof. And the trial upon the merits in both suits might take place upon the same testimony, presented by the same parties or those by whom they were legally represented.

It is not, therefore, perceived that any valid objection existed to the admission of the testimony excluded on account of the names of the parties in that and in the present suit.

It is insisted that the record of the former judgment could

not have been legally received under a plea of the general issue. That issue appears to have been formed at the trial before the justice of the peace as early as August, 1850. The judgment, to procure which the testimony excluded was introduced, was not recovered till September, 1853. The former judgment might have been admitted under the general issue: 1 Greenl. Ev., sec. 531.

It is further insisted that the testimony was properly excluded because the record of the former judgment was not introduced. It appears to have been offered by a cross-examination of witnesses introduced by the plaintiff before the defendant could be called upon to present the record. It does not appear to have been excluded because the record had not been presented.

Parol testimony was receivable to show that the same matter was directly put in issue in the former and in the present suit, and that the decision in the former was upon the merits: *Rogers v. Libbey*, 35 Me. 200.

If upon the testimony the jury should have been satisfied that the same acts of alleged trespass had been directly put in issue, and that a decision upon them had been made in the former suit on trial of the merits, that decision, exhibited by the record of the judgment, should have been held to be conclusive. 1 Greenl. Ev., sec. 531; *Marsh v. Pier*, 4 Rawle, 288 [26 Am. Dec. 131].

The testimony of a deceased witness on a former trial is admissible only when the witness can state the substance of his whole testimony. He should be able to state the whole of the ideas communicated to the jury by that testimony, so far as they related to the point in issue. The magistrate before whom the former testimony was given appears to have been properly admitted, for he professed to be able so to state the whole testimony of the deceased witness. When he came to testify, he appears to have failed to do so. The exceptions state that he "said distinctly that he could not give all his testimony, and had not." This was sufficient to show that the testimony of the deceased witness was not so presented as to make it legal testimony, and it should then on defendant's motion have been excluded.

Exceptions sustained, verdict set aside, and new trial granted.
TENNEY, J., concurred in the result only.

CASES SIMILAR IN PRINCIPLE TO *EMERY v. FOWLER* are those in which a judgment in favor of a deputy sheriff is held to be conclusive in a subsequent action against the sheriff, where both actions are for the same act. Such a

case is *King v. Chase*, 41 Am. Dec. 675; see the cases cited in the note thereto, where the question is discussed. So a judgment in trover, on which execution has issued but not satisfied, is a bar to an action of trespass brought by the same plaintiff against another person for taking the same goods: *White v. Philbrick*, 17 Id. 214. See the note to *Redmond v. Collins*, 27 Id. 223.

FORMER RECOVERY MAY BE GIVEN IN EVIDENCE UNDER GENERAL ISSUE, without being specially pleaded: 1. When the party who seeks the benefit of it had no opportunity to specially plead it; 2. By the defendant in those cases in which other matters in discharge of the action can be proved under the general issue: *Young v. Rummell*, 38 Id. 594. Former recovery is admissible in evidence if there was no opportunity to specially plead it: *King v. Chase*, 41 Id. 675. It is admissible under the general issue in an action on the case: *Jones v. Weathersbee*, 51 Id. 653; *Whitney v. Town of Clarendon*, 46 Id. 150; and in *assumpsit*: *Reynolds v. Stanbury*, 55 Id. 459; *Wann v. McNulty*, 43 Id. 58.

DIFFERENCE BETWEEN PLEADING FORMER RECOVERY IN BAR AND GIVING IT IN EVIDENCE UNDER GENERAL ISSUE.—A former recovery operates as a bar by way of estoppel only when specially pleaded: *Gray v. Gillilan*, 60 Id. 761; *Wann v. McNulty*, 43 Id. 58. It is only *prima facie* evidence when introduced in evidence under the general issue in *assumpsit*, while if specially pleaded it would have been conclusive. So say the above cases, but in *Young v. Rummell*, 38 Id. 594, and the cases cited in the note thereto, the rule is laid down that whenever a former recovery is admissible in evidence under the general issue the estoppel is as conclusive as if the recovery had been specially pleaded. This question is discussed in *Lentz v. Wallace*, 55 Am. Dec. 569, and *Jones v. Weathersbee*, 51 Id. 653, and they each declare the true rule to be that a former recovery directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties on the same matter. This rule was adopted by the courts in the above cases, from the opinion of the judges as delivered by Lord Chief Justice De Grey in the *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 424; S. C., 20 State Trials, 538. This rule is discussed at length in *Wood v. Jackson*, 22 Am. Dec. 603, where the rule as above expressed is limited, the court holding that a former recovery is only *prima facie* evidence when introduced under the general issue. If a party relying upon a former judgment fails to specially plead the same, in an action where judgments are required to be specially pleaded, the estoppel is waived and the jury may inquire into the merits of the case: *Kilheffer v. Herr*, 17 Id. 668, and note.

PABOL EVIDENCE TO SHOW WHAT MATTERS WERE PASSED UPON IN FORMER ACTION: See note to *Eastman v. Cooper*, 26 Id. 610; *Wood v. Jackson*, 22 Id. 603; *King v. Chase*, 41 Id. 675; *Parks v. Moore*, 37 Id. 589; *Doty v. Brown*, 53 Id. 350; *Smith v. Redus*, 44 Id. 429; *Gray v. Pingry*, 44 Id. 345; *Gray v. Gillilan*, 60 Id. 761, and the notes to those cases.

EVIDENCE OF WHAT DECEASED WITNESS TESTIFIED TO ON FORMER TRIAL. Testimony of what deceased witness swore to on a former trial of the same cause is admissible if the witness can state the whole substance of what was so sworn to, although he may not be able to give the exact words. But if the witness be unable to recollect the whole of such deceased witness's testimony on cross-examination at such former trial, his testimony cannot be admitted: *Gildersleeve v. Caraway*, 44 Id. 485. The testimony of the deceased witness must have been given upon a former trial of the same cause: *Watson v. Proprietors of Lisbon Bridge*, 31 Id. 49; *Osborn v. Bell*, 49 Id. 275; as evidence of

what deceased witness swore to on the trial of a different cause is inadmissible: *McMorine v. Storey*, 34 Id. 374. Such testimony must, in England, be proved in the very words of the deceased witness, but in this country it is sufficient if the entire substance of his testimony be proved: *Garrott v. Johnson*, 35 Id. 272, and note; *Marsak v. Jones*, 52 Id. 67; *Wagers v. Dickey*, 49 Id. 467, and note.

TESTIMONY OF DECEASED WITNESS ON FORMER TRIAL of the same action may be given in evidence if the substance of it can be proved, although the exact language of the witness cannot be: *Lime Rock Bank v. Hewett*, 52 Me. 581. So where the deposition of a witness has once been legally taken and used at a trial in court, and the witness is dead, the deposition is admissible in evidence, in a subsequent proceeding between the same parties and involving the same issue: *Chase v. Springvale Mills Co.*, 75 Id. 156, both citing the principal case.

IF FORMER JUDGMENT HAS BEEN RENDERED IN CASE WHICH IS BEING RE-LITIGATED, and the record does not show it, evidence *alibi* is admissible to show that the same facts were adjudicated in the former suit: *Walker v. Chase*, 53 Me. 258; *Starlevant v. Randall*, Id. 149; Freeman on Judgments, sec. 273; a judgment in favor of a servant estops the plaintiff from proceeding against the master for the same acts: Freeman on Judgments, sec. 179.

PERRIN v. NOYES.

[39 MAINE, 384.]

IF IT IS SHOWN THAT FRAUD WAS PRACTICED IN INCEPTION OF NOTE, OR THAT IT WAS FRAUDULENTLY put in circulation, such fact will throw the burden of proof upon the plaintiff to show that he came by the possession of the note fairly, in the due course of business, and without any knowledge of the fraud, and unattended with any circumstances justly calculated to awaken suspicion.

ASSUMPTION on a promissory note made by the defendant and indorsed by one Hazard. Plaintiff obtained the note through one Center, a Boston broker, duly indorsed before maturity. The evidence conflicted as to whether the note was intended as collateral security for paper held by plaintiff against Hazard, or whether it was negotiated unconditionally for value; if the latter, it was contended that Center had no authority to so negotiate it. The verdict went for plaintiff, and defendant excepted.

Gilbert, for the exceptions.

Bronson and Sewall, contra.

By Court, TENNEY, J. It is not disputed that the note in suit was negotiated, and came into the hands of the plaintiff before its maturity. But from the evidence reported, it was a point in controversy whether it was left as collateral security for paper of Samuel L. Hazard, which he afterwards paid to the plaintiff,

or whether it was negotiated absolutely, and not for a specific purpose. And if the transfer to the plaintiff was absolute, another question was, whether Center, the broker who made it, was authorized to transfer the note in that manner, or did it in fraud of the defendant's rights.

The jury were instructed that "the case having been made out by the note in evidence, the burden of proof was on the defendant to show why he should not pay it; and if they believed the note was made and delivered to Center, to be used as collateral security of the note of Hazard, and that he negotiated it for a different purpose, unauthorized by the maker and indorser, the defense would not be complete, unless they were also satisfied from the evidence that the plaintiff, when he took the note, knew that it was to be negotiated only as collateral to the note of Hazard." Under these instructions the defense would fail, upon satisfactory proof of fraud in the transfer of the note and an entire want of consideration paid by the plaintiff for such transfer.

If fraud is practiced in the inception of a note, or the note is fraudulently put in circulation, the establishment of such facts will throw the burden of proof upon the plaintiff, to show that he came by the possession of the note fairly, in the due course of business, and without any knowledge of the fraud, and unattended with any circumstances justly calculated to awaken suspicion. The cases cited for the defendant are decisive of this principle. The plaintiff was relieved of this burden of proof, and the instructions were less favorable to the defendant than the law required.

Exceptions sustained, verdict set aside, and new trial granted.

IN SUIT BY INDORSEE AGAINST MAKER of a promissory note, if evidence raises suspicion to the extent of a *prima facie* case, the defendant may make the plaintiff show when and how he became the holder: *Snyder v. Riley*, 47 Am. Dec. 452, and cases cited in the note thereto. The holder of a bill or note is ordinarily presumed to be a holder for value, and is not to be put to a proof of it until the other party has attacked the consideration as now existing, or as having failed, or as illegal, or that the paper has been lost or stolen before it came to the possession of the holder: *Schaub v. Clark*, Id. 554; see also *Knight v. Pugh*, 39 Id. 99, and note. The principal case is cited and approved in *Smith v. Harlow*, 64 Me. 510; *Roberts v. Lane*, Id. 103, where the court say: "The defendant's allegation of fraud in the inception of the note does not seem to be traversed, and the result is, that the burden of proof is on the plaintiff to show that he has the rights of a *bona fide* indorsee." But in *Farrell v. Lovett*, 68 Id. 326, the authority of *Perrin v. Noyes* is materially limited. In this latter case the court decide that it is not sufficient to defeat the recovery of an indorsee of a promissory note to show that he took it under circumstances that might tend to excite suspicion. To the same effect is *Kellogg v. Curtis*, 69 Id. 212.

DUNCAN v. REED.

[39 MAINE, 415.]

POWERS AND DUTIES OF SHIP-MASTERS WHEN IN FOREIGN PORTS, AND IN CASE OF DISASTER, are very extensive. They are then the general agents of the owners so far as respects acts necessary to the successful prosecution of their voyage.

DUTY OF MASTER OF SHIP IN CASE OF DISASTER IS TO SAVE HER IF POSSIBLE, if not, to so dispose of the wreck that the owners may realize the most that can be saved therefrom; nor does his duty cease until the proceeds which may be saved are placed at the disposal of the owners.

MASTER OF VESSEL IS ENTITLED TO REASONABLE compensation for services rendered in disposing of the wreck of such vessel, and also remuneration for his necessary incidental expenses. In these expenses the items charged for physicians' bills, board, and the amount paid for his return passage are properly included.

CAPTAIN OF VESSEL CANNOT BE ALLOWED FOR SHORTAGE IN AMOUNT OF MONEY returned by him; at least without showing that the loss was not occasioned by any fault on his part.

Assumption by the owners of the brig Mechanic against the master thereof to recover a sum of money which they alleged belonged to them, and which he detained in his hands. The necessary facts are stated in the opinion. The case was referred to the court to make up a proper judgment.

Evans, for the defendant.

Randall, for the plaintiffs.

By Court, Rice, J. The facts reported in this case are very meager. It is presented upon the auditor's alternative report, without any statement of the evidence bearing upon the controverted items in the account. We are thus left to infer the facts from the general character of the business between the parties, and the nature of the items in controversy, rather than from any direct proofs in the case.

There are certain general principles applicable to cases similar to the one before us which will aid in solving satisfactorily most of the questions presented.

It seems that the brig Mechanic, of which the plaintiffs were owners and the defendant master, on a voyage from New York to Chagres, was stranded at the latter port, and lost before the delivery of her cargo, and that the wreck was sold, and the whole business closed up, at that place, December 11, 1850, and the proceeds of the property sold brought by the master to New York for the benefit of the owners.

While at Chagres, and on his passage to New York, the cap-

tain was sick, and incurred and paid physicians' bills to the amount of fourteen dollars. The plaintiffs object to the allowance of those items.

The expenses of curing a sick seaman in the course of a voyage is a charge on the ship, by the maritime law; and in this charge are included, not only medicine and medical advice, but nursing, diet, and lodging, if the seaman be carried ashore: *Harden v. Gordon*, 2 Mason, 541.

The act of congress of 1790, chapter 29, section 8, providing that there shall be kept on board of every ship or vessel of a certain specified tonnage a chest of medicines, etc., does not apply to cases where seamen are removed on shore and are deprived of the benefits secured by the act: *Id.* The same rule has been held to apply in case of the sickness of the master as of seamen: *The Brig George*, 1 Sumn. 151.

In this case, the ship having been stranded and lost, the master must of necessity have subsisted on shore, and the legitimate inference is that he could not avail himself of the benefits of the medicine-chest.

The powers and duties of ship-masters, especially when in foreign ports and in cases of disaster, either from the dangers of the sea or public enemies, are very extensive. They are then the general agents of the owners, so far as respects acts necessary to the successful prosecution of their voyage. Their authority extends to the hypothecation of the ship, for necessary repairs, or in case of severe disaster and urgent necessity, to the sale of the ship itself: *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249; *Hall v. Franklin Ins. Co.*, 9 Id. 466; *The Sarah Ann*, 2 Sumn. 206.

He must faithfully discharge every duty incumbent upon him and render a satisfactory account of all his transactions that he should receive a stipulated sum as wages, and be secured in all his advances that do not exceed the value of the vessel or the authority of the owner: 2 Jacobson's Sea Laws, Frick's ed., c. 1, p. 87.

In case of capture, it is the imperative duty of the master to remain by the ship until a condemnation and all hope of recovery is gone. He is intrusted with the authority and obligation to interpose a claim for the property, and to endeavor by all the means in his power to make a just and successful defense. To abandon the ship to her fate without asserting any claim would be criminal neglect of duty, and subject him to heavy damages for a wanton sacrifice of the property. As the law compels him

to remain by the ship, and attaches him in some sort to her fate, he is entitled to receive compensation for his services and incidental expenses, and this compensation is a charge to be borne, in the first instance, by the owner of the ship, and ultimately as a general average, by all parties in interest: *Willard v. Dorr*, 3 Mason, 161.

The principles of the above rule are equally applicable in cases of loss by the dangers of the sea. The master must abide by the ship to the last, and save her if practicable, and if not, so dispose of the wreck as that the owners may realize the most that can be saved therefrom. His duty, therefore, in case of disaster, does not close until the ship is in a place of safety, and the voyage ended, or in case of loss, until the proceeds which may be saved are placed at the disposal of the owners.

But these duties carry with them corresponding rights, and among them is the right to reasonable compensation for services rendered, and incidental expenses incurred while thus in the service of the owners. These rights and duties enter into and form a part of every contract between master and owners.

In the case at bar, the services of the master do not seem to have terminated until he arrived in New York and delivered the proceeds received from the sale of the wreck of the brig. To that point of time we think he was fairly entitled to remuneration for his necessary incidental expenses in the prosecution of the business of the owners, in the charge of their property. In these expenses the items charged for physicians' bills, board, and the amount paid for his passage are properly included. The owners surely are not in a position in equity and good conscience to resist the allowance of those items which have been included in the general average, and of which they have therefore received the benefit, as is the case of the charge for his passage to New York.

As to the charge for deficiency in the amount of money brought home by him, we do not perceive any authority for making these charges against the owners. As we understand the case, he himself presented the evidence of the amount he had received in Chagres, and if it did not hold out on a recount, it is his misfortune, or his fault; and for that deficiency he must look to the parties with whom he transacted the business. At all events, he cannot properly charge the owners therewith until he presents some evidence that the loss was not occasioned by any fault on his part.

Correcting the account of the auditor according to the above

principles, there will be found a balance due the plaintiffs of nineteen dollars and ninety-five cents, with interest thereon from the date of their writ, and for that sum they are to have judgment.

CASE SOMEWHAT SIMILAR TO PRINCIPAL ONE is *McGilbery v. Stackpole*, 61 Am. Dec. 245; see also *Pike v. Balch*, 1 Id. 248.

MASTER'S POWER TO SELL HIS VESSEL.—When the master of a vessel first assumed the power to sell his ship *virtute officii*, under any exigency whatever, the English courts denied his authority, and refused to recognize the validity of the title thus acquired: *Tremenhere v. Tresillian*, 1 Sid. 452; *Johnson v. Shippem*, 2 Ld. Raym. 982; *Reid v. Darby*, 10 East, 143; *Hunter v. Princep*, Id. 378. Although this power was, as we have seen, formerly denied, it is now the settled and received doctrine of the courts in this country as well as in England that the master has the right to sell his vessel in case of actual necessity. The necessity for the sale must be "absolute, paramount, and extreme." Those claiming under a sale by a master must be able to prove that there was a moral necessity for the sale, so as to make it an urgent duty upon the master to sell for the interest of all concerned: *The Henry*, 1 Blatchf. & H. 465; *The Amelie*, 6 Wall. 26; *The Sarah Ann*, 2 Sumn. 206; S. C., 13 Pet. 387; *Post v. Jones*, 19 How. 150; *Fitz v. The Galliot Amelie*, 2 Cliff. 440; *The Henry*, Blatchf. & H. 465; *The Patapeco Ins. Co. v. Southgate*, 5 Pet. 604; *Pope v. Nickerson*, 3 Story, 465; *Robinson v. Cons. Ins. Co.*, 3 Sumn. 220; *Somes v. Sugrue*, 4 Car. & P. 276; *Meaburn v. Leckie*, 4 Dow. & Ry. 207; *Hayman v. Molton*, 5 Esp. 65; *Hunter v. Parker*, 7 Mea. & W. 322; *Tanner v. Bennett*, Ry. & M. 182; *Idle v. Royal Exch. Assurance Co.*, 8 Taunt. 755; *Stephenson v. Piscataqua Ins. Co.*, 54 Me. 55; *Butler v. Murray*, 30 N. Y. 88; *Chambers v. Grantson*, 7 Bosw. 414; *Pierce v. Ocean Ins. Co.*, 29 Am. Dec. 567, and note; *Miston v. Lord*, 1 Blatchf. 354; *The William Carey*, 3 Ware, 313; *Joy v. Allen*, 2 Woodb. & M. 303-323; *The Schooner Tilton*, 5 Mason, 465-476; *Gordon v. Massachusetts Fire & M. Ins. Co.*, 2 Pick. 249; *Robinson v. Georges Ins. Co.*, 35 Am. Dec. 239; *Scull v. Bridle*, 2 Wash. C. C. 150; *Fontaine v. Phantz Ins. Co.*, 11 Johns. 293; *Read v. Bonham*, 3 Brod. & B. 147; *Winn v. Columbian Ins. Co.*, 12 Pick. 279; *The Ship Packet*, 3 Mason, 255; *The Ship Fortitude*, 3 Sumn. 228-249; *Pope v. Nickerson*, 3 Story, 465; *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Prince v. Ocean Ins. Co.*, 40 Me. 481; *Post v. Jones*, 19 How. 150; *McMasters v. Schoolbred*, 1 Esp. 237; *Green v. Royal Exch. Assurance Co.*, 6 Taunt. 68; *The Fanny and Elmira*, Edw. Adm. 117; *Underwood v. Robertson*, 4 Camp. 138; *Cannan v. Meaburn*, 1 Bing. 243, 465; *Freeman v. East India Co.*, 5 Barn. & Cress. 617.

In each of the above cases, and in fact in all cases discussing the question of the master's power to sell his ship, different forms of expression are employed to describe the degree of intensity of the necessity which is required to justify the sale. Perhaps the most comprehensive recitation of the circumstances which would render such a sale proper is that made by Mr. Justice Clifford in *Fitz v. The Galliot Amelie*, 2 Cliff. 445, where he says: "When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred, or if, being in a place where the repairs might be made, he has no funds in his possession, and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry or otherwise to execute the repairs, or if the injuries to the ship are so great that the

cost of repairing her would be greater than her value after the repairs were made, or if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage, then the master is justified in selling the ship as the best thing that can be done for the benefit of all concerned. Such a state of circumstances creates the moral necessity, the urgent necessity, the imperious, uncontrollable necessity, described in the decided cases, and authorizes the master to sell the ship, if in his judgment honestly exercised the sale will best promote the interest of all concerned. When those conditions, or any class of them, concur, it becomes the duty of the master to decide the question; and if he finds that the disaster will be most alleviated, and the interests of all will be best served, by a sale, then it is his duty to act in the premises; and if he makes the sale *bona fide* as the agent of all concerned, it is valid, and all are bound by his acts." This is about as perfect a recital of the law as could well be expressed. Another very luminous case is *Somes v. Sugrue*, 4 Car. & P. 276. Mr. Justice Davis, in *The Amelie*, 6 Wall. 18-27, says: "The sale of a ship becomes a necessity, within the meaning of the commercial law, when nothing better can be done for the owner or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified."

To render a sale valid made by a master of a vessel under the general authority vested in him, and convey a good title under it, there must be a necessity for such sale, and entire good faith on the part of the master. Entire good faith must concur with the necessity: *The William Cary*, 3 Ware, 313; *The Henry*, Blatchf. & H. 465; all the cases concur in this rule.

Before selling the ship, if the master can within a reasonable time consult the owners he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary: *The Amelie*, 6 Wall. 18. In *Scull v. Biddle*, 2 Wash. C. C. 150, the court, while agreeing that in extreme cases the master may sell his vessel and tackle in a foreign port, hold that he cannot make such sale in the country where the owner lives; but this rule is limited in *The Sarah Ann*, 2 Sumn. 206-215, where the court say: "It has been suggested at the argument that as the stranding was on a home shore, at no great distance from the residence of the agents of the owners, the master was not authorized to sell without consulting the agent or the owners. I agree at once to the position, if there is no urgent necessity for the sale. But if such an urgent necessity as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on a home shore or on a foreign shore, whether the owners' residence be near or be at a distance. I am aware of the doctrine maintained by my brother, the late Mr. Justice Washington, in *Scull v. Biddle*; and unless it is to be received with the qualification above stated, I cannot assent to it." The doctrine of this latter case was upon appeal reaffirmed, the court saying that the true criterion for determining the occurrence of the master's authority to sell is the inquiry whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel in time to direct the master before she will probably be lost. If a sufficient delay to communicate with the owners would be dangerous, he should act at once: *New England Ins. Co. v. The Sarah Ann*, 13 Pet. 387, 401.

A master should never sell, when in port with a disabled ship, without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend upon their recommendation, yet if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings strong evidence in justification of his conduct: *The Amelie*, 6 Wall. 18-27; *Gordon v. Massachusetts Fire & M. Ins. Co.*, 2 Pick. 240; *The Sarah Ann*, 2 Sumn. 215; *Cort v. Delaware Ins. Co.*, 2 Wash. C. C. 377; *Fentaine v. Phoenix Ins. Co.*, 11 Johns. 293; *Idle v. Royal Exch. Assurance Co.*, 8 Taunt. 755; *Hayman v. Molton*, 5 Esp. 67; *The Vivid*, 4 Ben. 326.

MASTER'S POWER TO SELL HIS CARGO.—There appears to be no doubt that where the cargo is so much damaged that to proceed with the voyage will endanger the safety of the ship, or render the cargo worthless, it is the duty of the master to land and sell it at the port of necessity, in the absence of instructions from the shipper. "It is universally admitted that in case of necessity, when the repairs of the ship or other expense necessary to enable the master to prosecute the voyage and deliver the cargo at the port of destination cannot otherwise be obtained, the master, in the exercise of a sound discretion, may either hypothecate the whole cargo or sell a part for the accomplishment of the voyage:" Dixon's Law of Shipping, sec. 165. In a case of disaster, such as injury to a vessel, if the cargo is of a perishable nature and the ship cannot in a reasonable time be repaired, the master may either sell or tranship the cargo. The master is not ordinarily the agent of the shipper for any other purpose than that of carrying and delivering the goods, but in cases of unforeseen and unprovided necessity the law clothes him with the authority of a supercargo, and he is to make such disposition of the cargo as will be most for the interest of the merchant. In such a case he acts as the agent of all concerned: *The Velona*, 3 Ware, 139; *Merton v. Lord*, 1 Blatchf. 354.

In *Butler v. Murray*, 30 N. Y. 88-98, the court, after saying that there is no doubt that, in order to justify the sale of a cargo at an intermediate port, several things must concur, very tersely and pointedly state them as follows: "1. There must be a necessity for it, arising either from the nature or condition of the property, or from the inability to complete the voyage by the same ship, or to procure another; 2. The captain must have acted in good faith; 3. He must, if practicable, consult with the owner before selling." The principles above announced will be found supported by the following cases: *The Ann D. Richardson*, Abb. Adm. 499; *Joy v. Allen*, 2 Woodb. & M. 328; note to *Williams v. Merle*, 25 Am. Dec. 616; *Ross v. The Active*, 2 Wash. C. C. 228; *Arthur v. The Cassino*, 2 Story, 81; *Post v. Jones*, 19 How. 160; Abbott on Shipping, 8th ed., 372; *The Packet*, 3 Mason, 255; *Hassam v. St. Louis P. Ins. Co.*, 56 Am. Dec. 591, and note; *The Zephyr*, 3 Mason, 341; *United Ins. Co. v. Scott*, 1 Johns. 106; *Pope v. Nickerson*, 3 Story, 485-491; *Peters v. Ballister*, 3 Pick. 495; *Dodge v. Union Ins. Co.*, 17 Mass. 478; *Chambers v. Grantzon*, 7 Bosw. 414; *De Bruns v. Lawrence*, 18 How. Pr. 141; *Bryant v. Comm. Ins. Co.*, 6 Pick. 131; *Graham v. Underwood*, 15 La. Ann. 402; *Saltus v. Everett*, 32 Am. Dec. 541; *Vlierboom v. Chapman*, 13 Mee. & W. 230; *Freeman v. East India Co.*, 5 Barn. & Cresa. 617; *Ebden v. Mitting*, 7 Com. B. 797; *Morris v. Robinson*, 3 Barn. & Cresa. 196; *The Gratitude*, 3 C. Rob. 240; *Watt v. Patter*, 2 Mason, 82; *The Packet*, 3 Id. 257; *The Van Syckle v. The Thomas Ewing*, 3 Pa. L. J. 301; *Myers v. Baymore*, 10 Pa. St. 114; *Smith v. Martin*, 6 Binn. 262; *Naylor v. Baitzell*, Tamm.

55; *Pike v. Balck*, 61 Am. Dec. 248; *The Joshua Barker*, Abb. Adm. 219; *Fountaine v. Col. Ins. Co.*, 9 Johns. 29; *Myers v. Baymore*, 49 Am. Dec. 586; see also *Hawerson v. Cole*, 40 Id. 603. As in the case of a sale of the ship by the master, he must, if possible, notify the owners of the cargo of his intention to sell the same: *Pike v. Balck*, 61 Id. 248; *Butler v. Murray*, 30 N. Y. 88.

The master has no power to sell the cargo to pay the general debts of the shipper, even if he has authority to dispose of it as he thinks best for the interest of the owner: *Peters v. Ballister*, 3 Pick. 495; nor will an authority be presumed from a former practice generally exercised to make such sales: *Id.*; *Henshaw v. Clark*, 2 Root, 103. The true criterion, according to which the acts of a master in selling his cargo is to be judged, is how an owner would have acted under like circumstances: *Winn v. Columbian Ins. Co.*, 12 Pick. 279.

MASTER'S POWER TO HYPOTHECATE SHIP, FREIGHT, AND CARGO.—It is now established law, upon the most satisfactory and conclusive grounds, that the master has the right, in case of necessity, to hypothecate the cargo, as well as the ship and freight. This doctrine was established in the case of *The Gratitude*, 3 C. Rob. 240, and has been reaffirmed in a large number of succeeding cases. The circumstances which would justify a master in resorting to an hypothecation are very accurately stated by Justice Clifford, with his usual felicity, in *Burke v. The Brig M. P. Rich*, 1 Cliff. 308-314, as follows: "Maritime hypothecations had their origin in the necessities of commerce, and are said to be the creatures of necessity and distress. They are of a high and privileged character, and are held in great sanctity by the maritime courts: 1 Conkl. Adm., 2d ed., 286. Such contracts, said Lord Stowell, in the case of *The Kenersey Castle*, 3 Hag. Adm. 7, were intended for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign ports, where the master and the owners are without credit, and where, unless assistance could be procured by means of such instruments, the vessel and cargo must perish. But the master is not the owner of the property, so as to have a right to bind it at his own will and pleasure. Hypothecation of the vessel by the master is only authorized when based upon necessity, and the required necessity is twofold in its character: it must be a necessity of obtaining repairs and supplies in order to prosecute the voyage, and also of resorting to such a loan from inability to procure the required funds in any other way. If the master has funds of his own, or of the owner in his possession or within his control, or if he can by any other reasonable means procure them upon his own credit or that of the owners, or by advances on the freight, or by passage-money, he is not at liberty to resort to a bottomry bond: *The Hersey*, 3 Hag. Adm. 407; *The Fortitude*, 3 Sumn. 234; *The Active*, 2 Wash. C. C. 226; 1 Conkl. Adm. 289; *The Aurora*, 1 Wheat. 102; *Thomas v. Osborne*, 19 How. 31. Such hypothecation can only be made by the master in a foreign port, but the term 'foreign port' in the jurisprudence of the United States includes all maritime ports other than those of the state where the vessel belongs." This is about as accurate and full a statement of the law relating to this question as could well be expressed. The same doctrine is maintained in *Harned v. Churchman*, 50 Am. Dec. 573; *The Packet*, 3 Mason, 255; *Clark v. Laidlaw*, 39 Am. Dec. 526; *The Fortitude*, 3 Sumn. 228; *Murray v. Lazarus*, 1 Paine, 572; *Ross v. The Active*, 2 Wash. C. C. 226; *The Yuba*, 4 Blatchf. 352; *The Lavinia v. Barclay*, 1 Wash. C. C. 49; *Patton v. The Randolph*, Gilp. 457; *Boreal v. The Golden Rose*, Bee Adm. 131; *Hurry v. The John and Alice*, 1 Wash. C. C. 293;

Hurry v. Assignees of Hurry, 2 Id. 145; *Walden v. Chamberlain*, 3 Id. 290; *Crossford v. The William Penn*, Id. 484; *Selden v. Hendrickson*, 1 Brock. 396; *The Medora*, 1 Sprague, 138; *The William and Emeline*, Blatchf. & H. 66; *Furniss v. The Magoun*, Olc. Adm. 55; *O'Hara v. The Mary*, Bee Adm. 100; *Tunno v. The Mary*, Id. 120; *Gibbs v. The Texas*, 1 Crabbe, 236; *Mervin v. Shailey*, 12 Conn. 489; *Sloan v. A. E. I.*, Bee Adm. 250; *Turnbull v. The Enterprise*, Id. 345; *Liebart v. The Emperor*, Id. 339; *Reade v. Commercial Ins. Co.*, 3 Johns. 352; *Kelly v. Cushing*, 48 Barb. 269; *Joy v. Allen*, 2 Woodb. & M. 303; *Naylor v. Baltzell*, Taney, 55; *The Grapeshot*, 9 Wall. 129; *The Williams*, 1 Brown Adm. 225; *The Bold Buccaneer*, 2 Eng. L. & Eq. 536; *The Alexander*, 1 Dod. 278; *The Orelia*, 3 Hag. Adm. 75; *The Maitland*, 2 Biss. 203; *The Zodiac*, 1 Hag. Adm. 320; *The Nuova Leonese*, 22 Eng. L. & Eq. 623; *Perkins v. The Currier*, 3 Woodb. & M. 82; *Bryant v. American Ins. Co.*, 13 Pick. 543; *The Boston*, Blatchf. & H. 309; *The Rhadamanthe*, 1 Dod. 201; *Cowan v. The Jacmel Packet*, 2 Bon. 107; *The Rubicon*, 3 Hag. Adm. 9; *Carrington v. Pratt*, 18 How. 63; *The Jane*, 1 Dod. 461; *The Robert L. Lane*, 1 How. 388; *The Virgin*, 8 Pet. 538; *The Saxe Coburg*, 3 Hag. Adm. 387; *Forbes v. The Hannah*, Bee Adm. 348; *Arthur v. Barton*, 6 Mee. & W. 138; *La Yeabel*, 1 Dod. 273; *The Circassian*, 3 Ben. 418; *The Oriental*, 7 Moore P. C. 398; *The Trident*, 1 W. Rob. 29; *Stainbank v. Penning*, 6 Eng. L. & Eq. 412; *The New World v. King*, 16 How. 469; *The Vabilia*, 1 W. Rob. 1; *The Gauntlet*, 3 Id. 29; *Ward v. Green*, 6 Cow. 173.

MASTER'S AUTHORITY AS AGENT OF OWNER.—The master of a vessel is the agent of the owners, and as such has an implied authority to bind them, even without their knowledge, by contracts relative to the usual employment of the ship. "Owners rarely navigate their own ship but almost always intrust its conduct and management to the master. They hold him forth to the world as authorized to contract, and by reason of their employment of the ship and the profit derived by them from that employment they are bound to the performance of every lawful contract made by him relative to the usual employment of the vessel." Abbott on Shipping, 156; 3 Kent's Com., 9th ed., 220; *The New World*, 16 How. 473; *Grant v. Norway*, 10 Com. B. 688; *The Bark Edwin v. The Naumkeag S. C. Co.*, 1 Cliff. 322; *Ross v. The Active*, 2 Wash. C. C. 228; *Eads v. The H. D. Bacon*, 1 Newb. Adm. 274; *Stocker v. Corbett*, 1 Const. Rep. 81; *McDaniel v. Emanuel*, 2 Rich. L. 455; *Nelson v. Belmont*, 21 N. Y. 36; *Purvis v. Tunno*, 2 Am. Dec. 664; *The Eolian*, Biss. 322; *Brown v. Lull*, 2 Sumn. 443; *The Grand Turk*, 1 Paine, 73; *Polland v. The Spartan*, 1 Ware, 134; *Sheppard v. Taylor*, 5 Pet. 675; *Pope v. Nickerson*, 3 Story, 456; *City Bank v. Nantucket S. Co.*, 2 Story, 16; *Gladding v. George*, 3 Grant, 290; *The Flash*, Abb. Adm. 71; *General Ins. Co. v. Ruggles*, 12 Wheat. 400; *Freeman v. Buckingham*, 18 How. 190; *The Phoebe*, 1 Ware, 263; *The General Worth v. Hopkins*, 30 Miss. 703; *Ward v. Green*, 6 Cow. 173; 3 Kent's Com., lect. 46 et. seq. This power of the master as agent of the owner extends to the employment of seamen: *Luscom v. Osgood*, 1 Sprague, 82; *Baker v. Corey*, 19 Pick. 496. The authority of the master as agent is limited to objects connected with the voyage, and if he transcends the prescribed limits, his acts are null and void: *Naylor v. Baltzell*, Taney, 55. This is the universal rule.

The master of a vessel has no power of buying and selling incident to his office as master, and when he is authorized by a letter of instructions from the owner to draw bills for the purpose of making purchases for such owner, he acts as agent or factor, and not as master, in drawing such bills: *Newhall v. Dunlap*, 31 Am. Dec. 45; *Calef v. Steamer Bonaparte*, 38 Id. 190.

MASTER'S AUTHORITY TO BIND OWNERS FOR REPAIRS AND SUPPLIES.—The master of a vessel may, in a foreign port, contract for repairs to his vessel, and for supplies for the same, and thereby bind the owners to the value of the ship and freight: *Naylor v. Baltzell*, Taney, 55; *The Aurora*, 1 Wheat. 102; *Thomas v. Osborn*, 19 How. 22; *The Brig George*, 1 Sumn. 151; *Joy v. Allen*, 2 Woodh. & M. 303-328; *Calef v. Steamer Bonaparte*, 88 Am. Dec. 190; *The Fortitude*, 3 Sumn. 228; *The Hilarity*, Blatchf. & H. 90; *Ross v. The Active*, 2 Wash. C. C. 228. The authority of a master in a foreign port to procure all supplies and repairs necessary for the safety of the ship and the due performance of the voyage is not confined to procuring only such supplies as are absolutely necessary, or indispensably necessary, but includes all such as are reasonably fit and proper for the ship and voyage: *The Fortitude*, 3 Sumn. 228. The principle upon which the master may bind his owners for repairs, etc., results from the general authority with which, from the necessity of the case, he is clothed, and which nothing but proof that some other person was intrusted to manage the concern, in the particular instance, and this known to the creditor, can defeat: *Phillips v. Ledley*, 1 Wash. C. C. 228. But the master's authority exists only in cases of necessity, and it is the duty of the creditor to see that a case of apparent necessity for a loan exists: *Thomas v. Osborn*, 19 How. 22. And the owners of a vessel are not personally responsible for debts contracted by the master for repairs, beyond the value of the ship and freight: *Naylor v. Baltzell*, Taney, 55.

Supplies are necessary when they are fit and proper for the service in which the vessel is engaged, and are such as a prudent owner would order: *The Madonna*, 1 Sprague, 138; *The Grapeshot*, 9 Wall. 130. The ordering by the master of supplies and repairs on the credit of the ship, when he acts in good faith, is sufficient proof of their necessity: *Id.*; *The Lulu*, 10 Wall. 192-203. If the master can communicate with the owners or their agents, without injurious delay, before ordering supplies or repairs, he must do so: *Woodruff & Beach Iron Works v. Stetson*, 31 Conn. 51.

The master of a vessel, merely as such, has no authority to order repairs in the home port: *Jordan v. Young*, 37 Me. 276; but he may have special authority to do so: *Dyer v. Snow*, 47 Id. 254.

CONTRACTS OF MASTER, BY WHAT LAW GOVERNED.—In the note to *Arayo v. Currell*, 20 Am. Dec. 293, the rule is laid down that "the master of a ship has no power to bind the owners thereof beyond the limits of the authority given to him by the express instructions of his principal, or beyond those limits which result from the laws of the country where the instructions are given, and that if he does exceed that authority his contracts are invalid as to the principal, and not binding upon him." This question is sufficiently discussed in this note.

MASTER OF VESSEL HAS NO AUTHORITY TO PURCHASE CARGO ON OWNER'S ACCOUNT: *Hewett v. Buck*, 35 Am. Dec. 243.

FRANKLIN BANK v. BYRAM.

[*39 MAINE, 489.*]

IF OVERDRAFT HAS BEEN PAID BY CASHIER OF BANK IT CAN BE RE-COVERED BACK BY BANK from the individual thus overdrawing.

PAYMENT UPON OVERDRAFTS IS NOT LOAN, WITHIN MEANING OF STATUTE which forbids any bank to make any discounts without at least two responsible names as principals, sureties, or indorsers.

ASSUMPSIT, the writ in which contained two counts, one for money had and received, the other for money paid, laid out, and expended. Plaintiff's claims were specified as for money paid out on defendant's checks. Upon a submission to the court, it found that plaintiff's cashier had permitted defendant to overdraw.

Evans, for the defendant.

Paine, for the plaintiff.

By Court, APPLETON, J. The evidence tends satisfactorily to show that the defendant has in his hands the funds of the Franklin Bank, which its cashier permitted him to overdraw.

It is insisted that such overdrawing is a loan, and as such within the prohibition of the revised statutes, chapter 77, section 19, which forbids any bank to make any discounts without at least two responsible names as principals, sureties, or indorsers, and that no action can be maintained for any funds of the bank which may be proved to be in the defendant's hands or to have been paid on his check. But this cannot be regarded as correct. It is no part of the duty of the cashier to make discounts. The loans of the bank are to be effected through the agency of its directors. No loan is shown to have been made by the bank; no discount by its directors within any meaning which can be properly given to either the word "loan" or "discount." This case is not, therefore, within the provisions of section 19.

The declaration contains the money counts, on which the plaintiff seeks to recover what is equitably due. If the cashier, without authority, misappropriates the funds of the bank; if he violates his trust; if he pay away money wrongfully, and that money can be traced into the hands of one connusant of his breach of trust and participant in his wrong-doings, it is difficult to perceive why redress should be denied the bank. In this view, it is immaterial whether it is paid out on a check or not. If the drawer of the check has no funds, the cashier is under no greater obligation to pay than if it were a mere verbal request. The overdrawing and the payment of the check overdrawn are both wrongful acts. If in such case the money of a bank has been misappropriated by its cashier, without the knowledge or consent of its officers, there is neither law nor equity in permitting the recipient to retain what he has received without right. The plaintiff may consequently recover the amount shown to have been overdrawn.

The authorities cited by the learned counsel for the defend-

ant upon examination fail to sustain the position upon which the defense rests. In *Harker v. Anderson*, 21 Wend. 372, it was held that an action cannot be maintained on a bank-check against the drawer until after notice of presentment and non-payment, and that a check is in effect and form a bill of exchange. As between the immediate parties to a bill, the consideration may be inquired into, and it may be shown that nothing was due when the acceptance was given, or that it was in whole or in part an accommodation. So as between the parties the acceptance of a bill is presumptive evidence of funds in the hands of the acceptor: *Kendall v. Galvin*, 15 Me. 131 [32 Am. Dec. 141]. "A check of itself," says Woodward, J., in *Lancaster Bank v. Woodward*, 18 Pa. St. 357 [57 Am. Dec. 618], "is not evidence of a debt or loan of money. The presumption is that it was given in payment of a debt, and that cash was given for it at the time." In that case no such question was raised as is here presented. "It was attempted to prove a custom to pay overdrafts of solvent dealers with banks, but it failed, and if it had not failed, such a custom should be abolished. *Malus usus abolendus est.*" But it is not intimated in that or in any case that if an overdraft has been paid by the cashier it cannot be recovered back by the bank from the individual thus overdrawing. The defense is alike without foundation in law and in morals.

According to the agreement of the parties, as the action is maintainable, an auditor is to be appointed, whose report is to be final, and judgment to be entered thereon.

TENNEY, J., being unable to be present at the argument, took no part in this decision.

AMOUNT OF OVERDRAFTS PAID BY BANK may be recovered by the bank from the person so overdrawing: *Trademens's Bank v. Astor*, 11 Wend. 87; *Keene v. Collier*, 1 Metc. (Ky.) 415.

HUTCHINSON v. CHASE.

[30 MAINE, 508.]

ONE BEING SOLE SEIRED OF MILL AND PRIVILEGES AND DAM CANNOT, BY MEANS OF SUCH DAM, flow lands above him owned by himself and another in common, nor can he convey to his grantees the right to do so.

IF ONE TENANT IN COMMON OF LAND OUST HIS CO-TENANT, LATTER MAY MAINTAIN EJECTMENT; if he destroys personal property owned in common, trover lies; if he sell the entire property, an action will lie against him; nor can he convey any part of the common property by metes and bounds.

ONE TENANT IN COMMON CANNOT SUBJECT COMMON PROPERTY to particular servitudes, by which the rights of his co-tenants will be affected.
IF ONE OF TWO TENANTS IN COMMON OF MILL AND MILL SITE, TO WHICH WAS APPURTEnant the right of flowing other lands above, owned by them in common, conveys his undivided one half to his co-tenant, together with appurtenances, this authorizes the latter to continue the flowing of such common lands and to transfer such right to his grantees.

THIS was a proceeding brought under chapter 126, revised statutes, against respondent, for flowing complainant's land by means of his dam. The opinion states the case very clearly. The verdict went for respondent.

Bradbury and Morrill, for the exceptions.

Bean and Paine, contra.

By Court, RICE, J. By the provisions of section 5, chapter 126, of the revised statutes, any person sustaining damages in his lands by their being overflowed by a mill-dam may obtain compensation for the injury by complaint to the district court in the county where the lands so flowed shall be situated, or any part of the same.

Section 9 of same chapter authorizes the owner or occupant of such mill to appear and plead in bar of such complaint that the complainant has no right, title, or estate in the lands alleged to be flowed, or that he has a right to maintain such dam and flow the lands for an agreed price or without compensation, or any other matter which may show that the complainant cannot maintain the suit.

The complainant's land alleged to be flowed is situated on Hale's brook, upper pond, and the defendant's dam is located on Hale's brook, below the lower pond.

A grant of land, the exterior bounds of which included the several parcels now claimed by the complainant and defendant, was made by the commonwealth of Massachusetts to Edmund Bridge, Robert Page, and Brown Emerson, July 2, 1785. Bridge released his interest in the above grant to Page and Emerson January 10, 1787. November 17, 1789, Page conveyed to Emerson that part of the land granted by the commonwealth, on which the dam of the defendant, of which complaint is made, now stands. September 18, 1790, Emerson conveyed to Chase Elkins certain lands and privileges, from "Lower Hale's brook pond to Jennings' meadow." This deed, after describing the land conveyed, continues, "as the said Elkins is to have all the said Emerson's right of building a dam or dams on that part of said brook above described, and also of build-

ing a dam and flowing Hale's brook, pond, and ponds; said tract of land contains about twelve acres."

So far as appears from the title-deeds, Emerson, at the date of the above deed, was sole seised of the mill privilege now owned by defendant, and seised as tenant in common with Page, of one half the land now alleged to be flowed. There is no evidence that the flowed land has been divided, and the tenancy in common thus sundered.

It does not seem to be contested that the title which Elkins acquired to the privileges and all his rights to flow, unless lost by adverse possession, have passed, by sundry mesne conveyances, to the defendant.

The earliest deed put into the case by the complainant, under which he claims title to the premises alleged to be flowed, bears date November 22, 1823. This sole seisin of the land was not controverted, subject, however, as the defendant contends, to his right to flow, in common with the complainant.

The defendant contends that in 1790, Emerson being sole seised of the mill privileges below the lower pond, and at the same time as tenant in common with Page of one half of the land flowed, would have the right, by his dam, to flow the land owned in common by himself and Page, and that this assumed right of Emerson's could be conveyed by him, and was conveyed to Elkins, under whom the defendant now holds.

The possession and seisin of one tenant in common is the possession and seisin of the other, because such possession is not adverse to the right of his companion, but in support of their common title. And although one tenant in common takes the whole profits, yet this does not divest the possession of his companion: *Greenl. Cru.*, tit. 20, *Tenancy in Common*, sec. 14.

It is upon this general rule of law, as applicable to this class of tenancies, that the defendant relies, in his argument, to show that Emerson might lawfully flow the land owned in common by himself and Page, and also that the grantees of Emerson were entitled to the same rights.

The rule, though general in its terms, is subject to many qualifications. One tenant in common is not remediless in case his co-tenant shall assume absolute dominion over the common property. The right of each extends to all and every part of the common estate. Absolute exclusion of one tenant from any part is a violation of his rights, for which the law will afford an appropriate remedy.

"If two tenants in common be of a folding, and the one of

them disturb the other to erect hurdles, he shall have an action of trespass *quare vi et armis* for this disturbance:" 1 Co. 200 b., note d.

"If two several owners of houses have a river in common between them, if one of them corrupt the river the other shall have an action upon his case:" 1 Co. 200 b., note e.

One tenant in common is not authorized to exclude another from the possession of land owned in common, or to destroy a chattel, or to sell the whole of it. If one tenant in common of land oust his co-tenant, the latter may maintain ejectment: *Goodille v. Tombe*, 3 Wils. 118; *Bracket v. Norcross*, 1 Me. 89. If he destroys personal property owned in common, trover lies: 1 Co. Lit. 200 a. So if he sell the entire property: *Furr v. Smith*, 9 Wend. 338 [24 Am. Dec. 162].

The general rule seems to be well settled that one tenant in common cannot, as against his co-tenant, convey any part of the common property by metes and bounds, or even an undivided portion of such part: *Barlet v. Harlow*, 12 Mass. 348 [7 Am. Dec. 76]; *Peabody v. Minot*, 24 Pick. 329; *Griswold v. Johnson*, 5 Conn. 866; *Smith v. Benson*, 9 Vt. 138 [31 Am. Dec. 614]. The reason is obvious. His title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a manner as to compel his co-tenants to take their shares in several distinct parcels such as he may please: *Great Falls Co. v. Worster*, 15 N. H. 412. Even though his deed may bind him by way of estoppel; as against the co-tenants, such deed is inoperative and void: 4 Kent's Com. 368.

Though tenants in common are in legal contemplation all seized of each and every part of the estate, still they are not permitted to do acts which are prejudicial to their co-tenants.

"Thus, if two tenants in common be of a wardship of the bodie, and one doth ravish the ward, and one tenant in common release to the ravisher, this shall go in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any bar to him. And as if two tenants in common be of an advowson, and they bring a *quare impletum*, and the one doth release, yet the other shall sue forth and recover the whole presentment:" 1 Co. Inst. 197 b.

As one tenant in common cannot convey the entire estate, or the whole of any portion thereof, or give a valid release for injuries done thereto, so, too, and for the same reasons, he cannot subject the common property to particular servitudes, by which the rights of his co-tenants will be affected. These ser-

vitudes or easements must be created by the owner, and one tenant in common cannot establish them upon the common property without the consent of his co-tenant: 3 Kent's Conn. 436; 2 Hill's Abr. 118.

Such, also, is the rule of the civil law. He who has the property of an estate only in common with others, without any division of the several shares, cannot subject any part of it to a service without the consent of all his copartners; and any one of them may hinder it until, the estate being divided into shares, every one may impose a service on his own share if he think fit. And likewise he who possesses in common and undivided a portion of the land, or "tenement to which the service is so due, cannot by himself free the land or tenement which owes the service; but the service remains for the portions of others. For these services are for every part of the land or tenement to which they are due, and every one of the proprietors has an interest in the service for his own portion:" Domat's Civil Law, Cushing's ed., par. 1035.

This principle has been applied to the class of cases now under consideration, and it has been decided that one tenant in common has no right, by means of a close erected on other land of which he is sole seised, to flow the land owned in common without the consent of his co-tenants. It is a wrong to his co-tenants of the same character, and which allows of similar remedies, as if they had been sole seised: *Odiorne v. Lyford*, 9 N. H. 502 [33 Am. Dec. 387]; *Great Falls Co. v. Worcester*, 15 Id. 412.

The case of *Tucker v. Campbell*, 36 Me. 346, has been cited to show that in a complaint for flowing land owned by tenants in common by means of a mill-dam all the co-tenants must join. At the trial, it was evidently supposed that the same principles were involved in this case that were settled by this court in that. Such, however, is not the fact. In the case at bar, there is no suggestion that the complainant is tenant in common of the land flowed. Of that he is sole seised. We have already seen that he is not, as was supposed, tenant in common of the right to flow. Therefore the legal objection to the maintenance of the process supposed in the argument does not exist. But were it otherwise, the difficulties presented in *Tucker v. Campbell, supra*, would not exist in this case. If the defendant is owner of one undivided half of the right to flow, the complainant is the owner of the other half, and therefore, on that hypothesis, represents all the interest now existing in the land adverse to the defend-

ant. A judgment, therefore, which should settle the conflicting right to flow between these parties, would just as effectually close litigation as though the complainant was sole seized, because there is no other party in existence to join with him, or who could maintain a like complaint against the defendant. There could, therefore, by no possibility, be multifarious and conflicting judgments in this case, as was supposed in the case cited. At most, it could only affect the question of damages.

To flow the land owned in common by one tenant in common operates as an absolute exclusion of the co-tenant, *pro tanto*, from the beneficial use of the common estate for which he would have been entitled to a remedy at common law. In all cases, where applicable, the proceeding by complaint has been substituted by the legislature of this state for an action at common law. No practical difficulties being perceived in the way of maintaining this process, we think it cannot be defeated by technical objections.

As the case may be again presented to a jury, it may not be improper to make a suggestion in relation to the deed from Page to Emerson, under which the defendant holds. That deed conveys one undivided half of the land upon which the defendant's dam is now located, with all the "privileges and appurtenances thereunto belonging." Whether there was then, upon the land conveyed, a mill privilege and dam by which the land now owned by complainant was flowed, the evidence does not disclose. If such was the case, then the whole right to flow would seem to have been in Emerson at the time he conveyed to Elkins, and to have passed by that deed to Elkins, and through him to the defendant.

As the case appears by the report, we are satisfied it was presented to the jury under an erroneous view of the law, and that a new trial should be had.

Exceptions sustained.

Verdict set aside, and new trial granted.

TENNEY, J., being unable to attend at the argument of the cause, took no part in the decision.

TENANT IN COMMON MAY MAINTAIN ACTION ON CASE against his co-tenant for flowing the land owned in common by means of a dam upon other land, for such act tortiously deprives the former of the use of the property, and is in the nature of the destruction of the use for which it was intended: *Odiorne v. Lyford*, 32 Am. Dec. 387; *Jones v. Weathersbee*, 51 Id. 653.

ONE TENANT IN COMMON, WHO HAS BEEN OUSTED BY HIS CO-TENANT, may maintain ejectment: *University v. Reynolds*, 23 Am. Dec. 234; *Thomas*

v. Garvan, 25 Id. 708; *McMahon v. McMahon*, 53 Id. 481; if one tenant in common destroys personal property owned in common, trover lies by the injured co-tenant: *Lowe v. Miller*, 46 Id. 188; *Hall v. Page*, 48 Id. 235; *Sanborn v. Morrill*, 40 Id. 701; *Welch v. Clark*, 36 Id. 368; *Guyther v. Pettijohn*, 45 Id. 499; if one co-tenant sells the entire property, an action will lie against him: *Warren v. Aller*, 44 Id. 406; *Hall v. Page*, 48 Id. 235; *Sanborn v. Morrill*, 40 Id. 701; nor can one tenant in common convey any part of the common property by metes and bounds: *Smith v. Benson*, 31 Id. 614; *Dennison v. Foster*, 34 Id. 429; and the cases cited in the notes to all of the cases cited above.

IN *FREEMAN ON COTENANCY AND PARTITION*, SEC. 249, the principal case is cited, and its doctrine as to the flowing of common lands by one co-tenant discussed, and similar cases cited.

CURTIS v. CURTIS.

[40 MAINE, 24.]

RELEASE BY HEIR APPARENT OF HIS ESTATE IN EXPECTANCY, with a covenant of non-claim, made fairly and with consent of his ancestor, precludes the releasor from afterward setting up a claim to any part of his ancestor's estate, either as heir or devisee.

PETITION for partition. The opinion states the case.

J. Godfrey, for the petitioner.

Knowles and Briggs, for the respondents.

By Court, RICE, J. Jacob Curtis, sen., on the twenty-eighth day of March, 1848, being the father of six children then living, disposed of all his estate, real and personal, by will. He devised all his personal estate, and one undivided half of all his real estate, to Jacob Curtis, jun., with whom he appears to have lived. The other half of his real estate he devised in equal proportions to his five remaining children, viz., John, Jeremiah, Thomas R., Sarah, and Eliza.

On the twelfth day of August, 1848, John Curtis, the petitioner and one of the five children above named, in consideration of two hundred dollars paid by Jacob Curtis, jun., conveyed by deed of quitclaim "all the estate, right, title, interest, claim, and demand whatsoever, both at law and in equity, which the said John Curtis now has, or hereafter can have, either by will, or descent, or otherwise, in, to, or out of all and singular the lands, tenements, hereditaments of my father, Jacob Curtis, sen., of said Hampden." This deed contains a full covenant of non-claim on the part of the grantor, his heirs and assigns; and upon the deed is the following memorandum signed by Jacob Curtis,

sen., and witnessed, to wit: "I, Jacob Curtis, sen., give my assent and approval to the above deed." The deed was entered of record August 31, 1848.

Thomas R. Curtis, one of the legatees above named, deceased in August, 1852, leaving no issue. The testator died in September, 1852, and his will was duly proved and allowed in probate court.

By the decease of Thomas R. without issue, before the death of his father, the testator, his legacy, being equal to one-tenth part of the real estate of the testator, lapsed, and there being no residuary clause in the will, was undisposed of thereby, and consequently, on the decease of the testator, descended, under our statute of distribution, in equal proportions to all the children of the testator then living, including Jacob, jun.

The rights of the petitioner at that time, independent of his deed above referred to, would stand thus: he took as legatee under the will one-tenth part of the real estate of the testator, or five fiftieths. He inherited, as heir at law, one fifth of the lapsed legacy of Thomas R., which was undisposed of by the will, which was one fifth of one tenth, or one fiftieth, making his entire interest six fiftieths of all the real estate of the testator.

Such would be his rights in the estate were it not for his deed, by which it is contended he has divested himself of all his interest therein, both as legatee and heir.

It is laid down by Lord Coke, Co. Lit. 265 a, when a son releases in the life of his father, the release is void, because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the son shall enter into the land against his own release. But if there be a warranty annexed to the release, then the son shall be bound, for albeit the release cannot bar the right for the cause aforesaid, yet the warranty may rebut and bar him and his heirs of a future right which was not in him at that time; and the reason wherefore the warranty shall bar the future right is for avoiding circuity of action, which is not favored in law.

There are two reasons why sales of expectant estates by heirs should be discountenanced: one, that it opens the door to taking undue advantage of an heir in distressed and necessitous circumstances; the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagance by disposing of the family estate: Sugd. on Vend. 370.

It was decided in *Boynton v. Hubbard*, 7 Mass. 112, that a contract made by an heir to convey, on the death of his ancestor, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud upon the ancestor, productive of public mischief, and void as well at law as in equity.

The doctrines of this case, in the broad terms in which they are laid down by the learned judge who delivered the opinion of the court, cannot, it is believed, be sustained by authority, but must be received with qualifications.

In *Fitch v. Fitch*, 8 Pick. 480, it was held that a covenant by an heir expectant that he will convey the estate which shall come to him by descent or otherwise is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor.

In *Trull v. Eastman*, 3 Met. 121 [37 Am. Dec. 126], it was decided that a release by an heir apparent, of his estate in expectancy, with a covenant of non-claim, is, if made fairly, and with the consent of the ancestor, a bar to the releasor's claim thereto by descent or devise after his ancestor's death.

Such is also the rule in equity. The whole doctrine of courts of equity with respect to expectant heirs and reversioners, and others in like predicament, assumes that one party is defenseless, and exposed to the demands of the other under the pressure of necessity. It assumes, also, that there is a direct or implied fraud upon the parent or other ancestor, who from ignorance of the transaction is misled into a false confidence in the disposition of his property. Hence it should seem that one material qualification of the doctrine is the existence of such ignorance. If, therefore, the transaction has been fully made known, at the time, to the parent or other person standing *in loco parentis*, and is not objected to by him, the extraordinary protection generally afforded in cases of this sort by courts of equity will be withdrawn. *A fortiori* it will be withdrawn if the transaction is expressly sanctioned and adopted by such parent, or person *in loco parentis*: *King v. Hamlet*, 2 Myl. & K. 456; 1 Story's Eq. Jur., sec. 339.

In the case at bar, the testator was connusant of the whole transaction, and gave it his express approval. There is no suggestion that fraud is practiced on the part of the grantee, nor that any undue advantage was taken of the grantor. But on the contrary, so far as appears, it was a family arrangement, deliberately and understandingly entered into by the parties, by

which the petitioner obtained a full equivalent for all the prospective rights which he relinquished. To permit him now to repudiate that arrangement would be to enable him to practice a fraud upon others, rather than to relieve him from an unconscionable contract.

Petition dismissed with costs for defendants.

RELEASE OF EXPECTANCY BY HEIR APPARENT, WITH WARRANTY, passes all his estate, so as to bar him from afterward setting up claim to any part of his ancestor's estate: See *Trull v. Eastman*, 37 Am. Dec. 126, and note 128-130; *Field v. Mayor of New York*, 57 Id. 435, and note 440. The principal case is cited to this point in *Russ v. Alpaugh*, 118 Mass. 376.

PENOBCOT RAILROAD CO. v. DUMMER.

[40 MAINE, 172.]

WRITTEN PROMISE TO TAKE CERTAIN NUMBER OF SHARES OF STOCK in a corporation which it is proposed to organize becomes a valid and binding contract by the subsequent organization of the corporation, and its acceptance of the subscription.

SHARES IN CORPORATION CANNOT BE LEGALLY ASSESSED before the number of shares required by its charter has been taken.

RECORDS OF CORPORATION ARE COMPETENT AND SUFFICIENT EVIDENCE, where no proof is introduced to destroy their effect, to show who are its corporators, and whether or not the required number of shares of its stock, provided by its charter, has been subscribed.

WHERE SUBSCRIPTION FOR STOCK STIPULATES THAT "ASSESSMENTS SHALL NOT EXCEED FIVE DOLLARS on each share at one time," several assessments may be voted at the same time, provided that no greater sum than five dollars on each share be made payable at one time.

PROVISION THAT SEVENTY-FIVE PER CENT OF COST OF RAILROAD SHALL BE SUBSCRIBED by responsible persons before it can commence to construct its road will not invalidate assessments on stock subscribed because some of the subscriptions necessary to make up that amount turn out to be worthless, if such subscriptions were obtained in good faith.

NO DEMAND FOR PAYMENT OF ASSESSMENT NEED BE MADE other than the giving of the notice required by the by-laws of the corporation, in order to maintain an action therefor.

ASSUMPSIT. The opinion states the case.

I. Washburn, jun., and Rowe and Bartlett, for the plaintiffs.

E. Kent and J. H. Hilliard, for the defendant.

By Court, SHEPLEY, C. J. This suit has been commenced to recover the amount of several assessments made on five shares of the capital stock of the corporation. The general issue

having been pleaded, the existence of the corporation, with capacity to sue, is thereby admitted.

The defendant subscribed for five shares in the month of March, 1851. The corporation was not organized until the following month of May. The subscribers for the stock agreed to take and fill the number of shares set against their names in the capital stock of the Penobscot Railroad Company, upon certain conditions. Several objections are made to the maintenance of the action.

1. The first is, that there being no such corporation existing when the agreement was made, there is no binding contract.

It amounted to a written proposal to take so many shares, and when the corporation had been organized and had accepted that proposal, a valid contract was made. When the corporation was organized, the shares subscribed for were recognized as shares of its stock, and the subscribers therefor as corporators. This was sufficient to complete the contract: *Kennebec & P. R. R. Co. v. Palmer*, 34 Me. 366; *Thompson v. Page*, 1 Met. 565.

2. The second objection is, that the capital required by the charter was not obtained; and that no legal assessments could therefore be made. This is a valid objection, if sustained.

The additional act, approved on August 21, 1850, required that the capital should consist of not less than one thousand nor more than six thousand shares. At the meeting for organization, a committee appointed for that purpose reported that twelve hundred and ten shares had been subscribed for, stating the names of the subscribers and the number of shares which each had agreed to take. That report was accepted by the corporation, and those persons were thereby recognized as corporators and shareholders. The defendant and most of the others appear to have been present and to have acted as stockholders,

It is still insisted that one thousand shares had not been taken, because it appears that the subscriptions made for Samuel Dakin and for the town of Orono were not binding. The subscription for Dakin appears to have been made by Gideon Mayo. The corporation appears to have regarded the subscription as made by Dakin, and to have chosen him as one of its directors, to which office he was not eligible, unless he was a stockholder. He appears to have accepted the trust, and to have acted in that capacity, and he does not appear to have denied at any time the authority of Mayo to subscribe for him. This would seem to be a sufficient recognition of the validity of that subscription by both of the parties.

The subscription for the town of Orono appears to have been made by certain persons assuming to have authority to make it. The shares thus subscribed for appear to have been paid for in part by money of the town. There is no proof that the subscription was not made by those duly authorized to make it. The corporation has accepted, as before stated, that subscription as valid, and has received payment in part for those shares.

When a corporation has proceeded regularly to ascertain its corporators and the owners of shares in its capital, and has entered them in its records, all parties become thereby *prima facie* entitled to the rights thus secured to them. The records are competent and sufficient evidence of them, unless proof be introduced to destroy their effect.

3. The third objection is, that the assessments were not legally made. One reason assigned is, that Dakin, not being a stockholder, could not be legally chosen a director. Its insufficiency has been already noticed. Another reason assigned is, that several of the assessments were made at the same time. The subscription was made in terms, requiring that "assessments shall not exceed five dollars on each share at one time."

It might have been an important consideration to have no greater sum payable and called for at one time. The time when those assessments should be voted could be of little, if of any, importance. The design appearing to have been to protect the shareholders from the payment of more than five dollars on each share at one time, the language should be so interpreted as to secure to them the benefits intended, without otherwise embarrassing the movements of the company.

4. Another objection is, that the corporation has not in its acts conformed to the terms of the subscription, and to the provisions of the third section of the act of 1850. The provision is: "Said company shall not engage in nor commence the construction of any section or sections of said railway until seventy-five per centum of the estimated cost of said section or sections shall have been subscribed for by responsible persons."

The intention would seem to have been to allow the company to proceed, for certain purposes, with the capital to be received for one thousand shares, but to prohibit it to commence the construction of any section of the road unless a subscription should be obtained from responsible persons for three fourths of the estimated expenses, for the purpose of preventing a waste of capital upon the whole line of the road, when it might never be able to complete it. A large amount appears to have been

subscribed for H. C. Seymour by Hervey Nash before the construction of the road was commenced. Nash testifies that Seymour "told him a month before he subscribed that he had agreed to subscribe for stock to the amount of one hundred and seventy thousand dollars, and that he told him to subscribe for him, and he did so, and that he considered him responsible for that amount."

It is however insisted that he and another person were not responsible for the amount by them subscribed.

If the company obtained subscriptions to the amount required in good faith, from persons apparently able to pay or to procure others to pay for the shares, it could not have been the intention to render its proceedings illegal and void, if those subscriptions should finally prove to be of little value. That would have exhibited an intention to impute crime to misfortune. It is upon the apparent condition of men and things that business must be transacted by corporations as well as by individuals, while success may depend much upon the care exercised to ascertain their true condition. The testimony does not show that the company did not act in good faith in receiving those subscriptions, or that it had not at that time reason to conclude that payment would be made for those shares, although the death of Seymour and the insolvency of his estate may lead to the conclusion that he was not at that time a responsible person for that amount.

The provision of the statute imposing this obligation upon the company does not appear to have been intended to prevent assessments upon the shares. Money might have been necessary for other purposes.

5. Another objection is, that no demand for payment of the assessments was made before the suit was commenced.

The fifth section of the statute requires that notice should be given "as shall be prescribed by the by-laws of said corporation."

The twelfth by-law prescribes the manner in which it should be given.

The treasurer appears to have given the notices required. No other demand was necessary.

Defendant defaulted.

SUBSCRIPTION TO STOCK OF CORPORATION BECOMES BINDING CONTRACT
on acceptance by the corporation: See *Phipps v. Jones*, 58 Am. Dec. 708, and note collecting other cases 713; *Galt v. Stain*, 60 Id. 311, and note 313.

RECORDS OF CORPORATION MAY BE INTRODUCED IN ACTIONS ON SUBSCRIPTIONS to prove its corporate existence: *Henton v. Cincinnati etc. R. R. Co.*, 16 Ind. 282, citing the principal case.

SUBSCRIBER TO STOCK IN CORPORATION CANNOT BE ASSESSED until the number of shares required by the charter is subscribed: *Penobscot & Kennebec R. R. Co. v. Whittier*, 12 Gray, 250, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Wight v. Springfield and New London R. R. Co.*, 117 Mass. 227, where the court say that the language in the principal case, relative to whether a person not a stockholder in a corporation may be a director, was not necessary to the decision, and therefore is not authority.

SAVAGE v. BANGOR.

[40 MAINE, 176.]

TOWN IS LIABLE IN DAMAGES FOR INJURIES SUSTAINED BY TRAVELERS using ordinary care in driving on a public highway, which such town is bound to keep in repair, when, by reason of snow-drifts, the part of the highway prepared for travel becomes impassable, and a passage-way outside and over the gutter of the road is used instead, by reason whereof the injury occurs.

NOTICE OF DEFECT IN HIGHWAY IS NECESSARY TO CHARGE TOWN THEREWITH, but actual notice is not absolutely necessary, as towns are bound to notice open and visible defects which could be prevented by common and ordinary diligence; and a thaw or rain occurring prior to an accident on a highway, rendered impassable by snow-drifts, is sufficient notice to the town that such highway is unsafe.

CASE for damages for injury to plaintiff, caused by defect in a highway which defendant was bound to keep in repair. The opinion states the facts.

Knowles and Briggs, for the plaintiffs.

A. Sanborn, for the defendants.

By Court, TENNEY, J. The plaintiffs seek compensation for an injury alleged to have been received by the female plaintiff in January, 1854, by the upsetting of a stage-sleigh upon a public highway which it is admitted the city of Bangor is bound to keep in repair.

It appears that for the distance of about thirty-five rods the part of the highway which had been prepared for the travel when not covered with snow was impeded with deep drifts for some time previous, without any attempt to make a path through them; and that the way for the passage of carriages had been broken out near the fence which bounded the road, over wood-piles and bob-sleds, and was the only one which could be used. The day before the accident it rained, and the snow melted. The place where the sleigh upset was where this way turned to go into the center of the road, at which there was a pool of

water, and it was impossible to determine whether the passage was safe or not. The ice over the ditch, which had formerly been sufficiently strong to bear the coach, had been so affected by the thaw that the runners of the sleigh broke through and fell into the water about two feet. The sleigh was upset, and the female plaintiff, who was sitting upon the box with the driver, was thrown into the water, and the sleigh rested upon her person, until she was extricated. Evidence was introduced on both sides touching the extent of the injury received.

It is objected to the maintenance of the action, that the accident occurred on a passage-way which was not that which had been prepared for the travel when the whole was free from obstruction by snow-drifts, and the case of *Johnson v. Whitefield*, 18 Me. 286 [36 Am. Dec. 721], is relied upon in support of the objection. It was therein decided that "while the town has done its duty when it has prepared a pathway of suitable width, in such a manner that it can be conveniently and safely traveled with teams and carriages, as required by the statute, the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out."

The case cited is in no sense analogous to the one before us. Here the city had omitted entirely to prepare such a pathway at the time of the accident. The traveler was obliged to abandon his intention of passing over the road, attempt to break through the drifts, which had long been unbroken, or pass over the only way prepared for use, which was then unsafe and inconvenient.

It would be unreasonable, and by no means in accordance with the provisions of the law, that the city should be exonerated from liability on account of an accident which was caused by a defective passage-way, near the exterior limits of the road, wholly or partially over the gutter, when the traveled portion, wrought into a road, was at the time impassable because at a different season of the year, before it was all which the statute required, and the passage-way upon which the injury was done was the only one where travelers could pass. Such a construction would require that when the ground is covered with snow every traveler must know the precise spot where the road was prepared for travel before the snow fell, and if the only path was upon another part of the highway, and that path defective, he must pass thereon at his own risk, or continue his course upon the wrought portion, notwithstanding the impediments, or terminate it altogether.

It is competent for the proper agents of the town to change

the wrought portion of the road at pleasure, and if they should suffer the part formerly traveled to become ruinous, and its use should be attended with great peril, and should work the road for travel on a different line within its limits, no one would maintain that an ordinary defect in the latter which caused an injury would not subject the city to the liability of making compensation; and whether the defect in the part formerly prepared and used is by the removal of the substances of which it was composed or by the placing of obstructions thereon would have no effect to make the liability greater in one case than in the other; and whether the obstructions were drifts of snow, or other things, is quite immaterial.

It is denied by the city of Bangor that it had notice of the defect, if one existed in the highway, so that it can be chargeable. Notice is necessary, but actual notice is not in all cases required. If the defect had existed for so long a time that citizens must be presumed to have known its existence, that notice is sufficient. Open and visible defects, such as could be prevented by common and ordinary diligence, towns and cities are by law bound to notice and guard against: *Lobdell v. Inhabitants of New Bedford*, 1 Mass. 153.

In this case the city is supposed to have known by its officers that the traveled way at the time of the accident was on a part of the highway which must be disturbed materially by the melting of the snow; that water would probably settle into the gutter, under the ice, which, by those means and others which would produce material changes in this passage during a thaw, would naturally render it more unsafe and inconvenient than before. The rain and the warm weather had continued so long a time before this accident that the officers of the city must have been admonished that this portion of the road would require attention, and they were bound to put it in a condition less perilous than that in which it was found.

It is necessary that the plaintiffs should show that there was the exercise of ordinary care on the part of the plaintiff injured, and in the manner in which she was carried in the sleigh in the charge of the driver. The latter was a witness without objection. The manner in which he drove his horses was such that it would seem that no blame could be imputable to him in that respect. The horses were entirely under his control, so far as the evidence shows the facts. No want of care appears touching the selection of the particular place on which he drove them. The driver says in his testimony that it was impossible to tell

whether it was safe going over the pool of water or not. By this it is understood that the condition of the road was unusual; that a part was covered with water; but no means were presented by which he could determine the effect which the water had produced; the safety could not be determined with certainty by a traveler without experiment. It does not appear that he was wanting in ordinary care.

From the whole evidence in the case, it is believed that the plaintiffs are entitled to recover the damages which have been sustained.

It is not clearly proved that any bruises or injury, upon particular parts of the person of the female, were inflicted. That she was thrown into the water and was exposed to danger is fully shown. The state of her health before and afterwards, from the whole evidence, is left quite indefinite and uncertain. But it appears that generally she suffered in this respect more subsequent to the accident than previously. How far this was the result of the injury for which the city is accountable, or the fruit of the exposure, while in her wet clothes, during a ride of considerable distance, it is difficult to determine with certainty.

According to the agreement of the parties, a default must be entered and damages awarded for the sum of one hundred and fifty dollars.

APPLETON, J., living in the defendant town, took no part in the opinion.

TOWN IS BOUND TO KEEP HIGHWAY IN REPAIR, and for neglect is liable in damages to person injured thereby: See *Hutton v. Mayor of New York*, 58 Am. Dec. 526, and note collecting other cases 528. On this point the principal case is cited in *Indianapolis v. Gaston*, 58 Ind. 232. Town is bound to remove obstruction of snow-drifts for use of wheeled carriages: See *Dutton v. Ware*, 43 Am. Dec. 590.

THE PRINCIPAL CASE IS DISTINGUISHED in *Green v. Town of Bridge Creek*, 28 Wis. 460, where the case was one of injury to a bridge not part of a highway, and the court held that the town was not liable.

WHIDDEN v. SEELEYE.

[40 MAINE, 247.]

PLAIS OF ABATEMENT MAY BE OBJECTED TO ON GENERAL DISMURRER, because defective in not being verified by affidavit when of facts not apparent of record, or for not being seasonably filed, or for not being entitled of the term when the writ and declaration was entered.

LAW OF FOREIGN COUNTRY IS FACT TO BE PROVED.

CONTRACTS AND DEEDS MADE IN FOREIGN COUNTRY must, in the absence of evidence of what their legal effect would be in the place in which they were executed, receive the same construction and have the same effect as if they were executed in the place where the action to enforce them is brought.

TROVER LIES BY MORTGAGEE IN POSSESSION AGAINST STRANGER FOR CUTTING TREES upon the former's premises and taking them away, the severance constituting the trees personal property, and the taking away the asportation for which the action lies.

TROVER IS TRANSITORY ACTION, AND LIES FOR CONVERSION of personal property in a foreign jurisdiction.

INSTRUCTIONS ON MATTERS IMMATERIAL TO ISSUE, though wrong, are of no avail to a party excepting.

TROVER for certain logs and other property of plaintiff alleged to have been converted by defendant. A plea in abatement was filed, to which plaintiff entered a general demurrer. On the hearing, the plea was overruled, and defendant answered, pleading the general issue. The evidence showed that plaintiff held certain lands under a mortgage deed of warranty, and that while so holding the defendant and plaintiff entered into an agreement whereby the latter was to attend to certain lumbering business on the said land, for which he was to receive a fixed compensation besides one third of the profits of the lumbering operations, but the plaintiff was to have full control of the property and lumber, to dispose of the same to the benefit of all concerned. There was evidence tending to show that at some time there had been a grant of the greater portion of the mentioned premises to the defendant. It was proved that while plaintiff was so holding possession of the land under the mortgage, defendant cut and took away from such premises the logs for which this action was brought. Verdict for the plaintiff. Defendant excepted, and also moved to set aside the verdict. The further facts are stated in the opinion.

J. Granger, for the defendant.

B. Bradbury and C. R. Whidden, for the plaintiff.

By Court, APPLETON, J. The plea in abatement is fatally defective. It is of facts not apparent of record, and should be verified by affidavit. It does not appear to have been seasonably filed: *Nickerson v. Nickerson*, 36 Me. 417. Nor does it appear to be entitled of the term to which the writ was returnable. Nothing is better settled than that advantage may be taken of these defects on general demurrer.

The law of a foreign country is a fact to be proved. Certain

deeds and contracts, executed in the province of New Brunswick, were received in evidence. The rights of the parties to this suit depended upon the construction of, and the effect to be given to, these deeds and contracts. Neither party saw fit to introduce any evidence as to what, under the facts proved, would be their legal effect in the place in which they were executed. But when the law of the place where they were executed is not shown, they must receive the same construction and have the same effect as if they were executed in the state in which the trial is had. No evidence is furnished by the parties. The *lex loci* not being shown, the court cannot assume it variant from the *lex fori*. In *Legg v. Legg*, 8 Mass. 99, the court declare that they cannot judicially take notice of the laws of another state, and that they would presume its laws similar to their own. This doctrine received the sanction of the supreme court of New York in *Holmes v. Broughton*, 10 Wend. 75, and in *Leavenworth v. Brockway*, 2 Hill (N. Y.), 201. In *Allen v. Watson*, 2 Hill (S. C.), 319, the plaintiff sought to recover a sum of money, as belonging to him, which the defendants had won at a faro-table in Georgia. The defendants insisted, that before the plaintiff could recover, he must show playing at faro to be unlawful by the law of Georgia. The court, however, said: "It is true, the legality or the illegality of any transaction must depend on the law of the state where it transpires, but it is incumbent on those who would avail themselves of it to show what that law is. In this state [South Carolina] playing at faro is unlawful and punished by fine; and if we are obliged to determine that question in utter ignorance of what the law of Georgia is, we must resolve it by our own rule, for the obvious reason that we have no other." In *Crosier v. Hodge*, 3 La. 357, Porter, J., says: "We have repeatedly decided that the laws of other states must be proved by evidence, to enable us to take judicial notice of them. When they are not so proved, we must decide the case by our own law." In *Brown v. Gracey*, 2 Dowl. & Ry. 41, note, Abbott, C. J., said that "if the law of Scotland differed from the law of England, as to the liability of the defendants, it was for the defendant to show it."

The court instructed the jury that the plaintiff "could not recover for any logs that had been taken from the land after he had parted with his title, or when he was not in possession of the land." We must presume that the verdict was rendered in accordance with this instruction, and that the logs, for the value of which the verdict was rendered, were cut and carried away, and converted by the defendant to his own use, while the

plaintiff had the title and possession of the land upon which they were cut.

The case, as disclosed in the evidence and as found by the jury, is of a mortgagor in possession against a trespasser upon the mortgaged premises, who has carried away the logs, the cutting of which constituted his trespass. The trees on the plaintiff's land, when severed from the freehold and carried away, became personal property, and his title thereto was not divested by the wrongful acts of the defendant. In *Nelson v. Burt*, 15 Mass. 204, it was held that trover would lie for cutting and carrying away corn standing and growing. "If," say the court, "the defendant was in fact a trespasser in entering the close and cutting down the corn, the property of the corn when cut was in the plaintiff, and the taking it away was a wrong for which trover will lie." In *Mather v. Trinity Church*, 3 Serg. & R. 509 [8 Am. Dec. 663], Duncan, J., says: "It [trover] does not lie for injuries to land or other real property, even by a severance from the freehold, unless there be also an asportation; that if, after the severance from the freehold, as in the case of trees cut down, the property severed be taken away, or if coals dug from a pit be afterwards thrown out, this action will lie by the person having the right and being in the possession, against a mere intruder and trespasser."

When there has been a severance of what belongs to the freehold and an asportation, the action of trover may be maintained: 3 Steph. N. P. 2665. The title to the property severed remains unchanged, and the owner may regard it as personal property and maintain replevin: *Richardson v. York*, 14 Me. 216. So the tort being waived, if the property severed has been sold, the action of *assumpit* may be maintained. As between mortgagor and mortgagee, the property in timber cut on the mortgaged premises is in the latter, and a purchaser from the mortgagor takes it subject to the paramount rights of the mortgagee: *Gore v. Jenness*, 19 Id. 53. Much more, then, may the mortgagor maintain trover against a mere intruder or wrongdoer.

The jury have found that the plaintiff was in possession of the mortgaged premises, and that the defendant cut thereon the logs in controversy. The logs having been severed from the freehold, and after such severance being personal property, and having been carried away and converted by the defendant to his own use, trover is the fitting and appropriate form of action in which to recover the damages resulting from their conversion.

It is a transitory action, and may be maintained in this state for a conversion of personal property in a foreign jurisdiction.

The instruction of the court, that the contract of December 26, 1840, between the plaintiff and Henry Seelye did not constitute a copartnership, is made the subject of exception. It is immaterial whether the ruling of the court on this point was or was not correct, inasmuch as if erroneous, it is not perceived that it could have operated injuriously to the defendant.

This suit is for logs cut on the land of the plaintiff, and which the defendant is proved to have converted to his own use. He claims no rights through, and derives none under, the alleged copartnership. The existence thereof is not a material fact, to be proved on the part of the plaintiff to enable him to maintain, nor on the part of the defendant to defeat, the present action.

Exceptions and motion overruled.

Judgment on the verdict.

FOREIGN LAWS MUST BE PROVED AS FACTS, and will not be judicially noticed: See *Phillips v. Gregg*, 36 Am. Dec. 158, and note 166; *Owen v. Boyle*, 32 Id. 143, and cases in note 148; *Pelton v. Platner*, 42 Id. 197; *Kohn v. Renaissance*, 52 Id. 577.

TROVER IS MAINTAINABLE FOR CUTTING AND CARRYING AWAY TIMBER, WHEN: See *McCoy v. Herbert*, 33 Am. Dec. 256; *Wright v. Guier*, 36 Id. 108, and cases cited in note 115; *Moody v. Whitney*, 61 Am. Dec. 239. To this point the principal case is cited in *Tyson v. McGuiness*, 25 Wm. 600, the court holding that when cut, trees become personal property, for the conversion of which trover will lie.

HARSH IN IMMATERIAL INSTRUCTIONS IS NOT GROUND FOR REVERSAL: See *McPherson v. McPherson*, 53 Am. Dec. 416, and note 419; *Nicholson v. New York etc. R. R. Co.*, 56 Id. 390, and cases cited in note 397; *Walters v. Jordan*, 57 Id. 558.

TITUS v. MORSE.

[40 MAINE, 348.]

SILENCE OF PARTY HAVING FULL KNOWLEDGE OF HIS OWN RIGHTS, so as to intentionally permit others to be deceived and misled in relation to them, will conclude him from afterwards interposing his claim to the prejudice of the party thus deceived or misled.

SILENCE OF PARTY IGNORANT OF HIS RIGHTS does not generally operate to his prejudice, but if he induce others, equally ignorant, by his active interference, to pursue a particular course, he will be estopped to deny rights acquired thereunder, on the ground that where one of several innocent parties must suffer, the loss should fall on the one by whom it was occasioned.

ESTOPPEL DOES NOT OPERATE TO EXCLUDE PURCHASER of one of two contiguous lots sold at public auction, at which sale a third person, at the

vendor's request, points out the line between two lots, to which boundary no objection is made, from claiming to the true line of his lot beyond the one thus pointed out, unless at the time of the sale he knew where the true line of the lots was, and the other purchaser was induced, and did purchase, in consequence of his silence, or of some other acts done by him.

DOCTRINE OF ESTOPPEL IN PAIS DISCUSSED.

TRESPASS *quare clausum*. The opinion states the case.

Ruggles and Gould, for the exceptions.

Lowell and Foster, contra.

By Court, RICE, J. This case is presented on exceptions, and on a motion for a new trial, on the ground that the verdict was against the evidence and the weight of the evidence. Both the exceptions and motion have been elaborately argued in writing. There was a large amount of testimony adduced at the trial, all of which has been reported. The report is in the main a transcript of the minutes of testimony taken by the presiding judge, made by the counsel for the defendant.

The action is trespass *quare clausum*. The parties are proprietors of contiguous lots, formerly known as the John Newbit and Christopher Newbit lots. The plaintiff claimed title by sundry mesne conveyances from John Newbit. Walter Blake, deceased, claimed title to both lots. His administrator, Blunt, by order of the judge of probate, sold at public auction Blake's title to both lots. There was evidence tending to prove that at the sale Charles Blake, a son of the intestate, in the presence of both parties, pointed out the dividing line between the two lots before they were sold, and that no objection was made to the line thus indicated. That line would exclude the *locus in quo* from the lot of the plaintiff. There was much testimony touching the occupation, by the owners of the different lots, of the *locus in quo*.

As to the effect of pointing out the dividing line between the lots by Blake, the presiding judge instructed the jury "that if at the time of the sale by Blunt, Blake's administrator, Charles Blake, at the request of said administrator, pointed out the line between the John and Christopher Newbit lots, and if both parties were present and heard and understood the description, and assented to its correctness, or expressed no dissent therefrom, and the different fields were thereupon sold in conformity with the boundaries thus pointed out, the plaintiff would be estopped from claiming title to the line then purchased by the defendants south of the line thus pointed out by Blake."

Estoppels were not favored at common law, because it is said they tended to exclude the truth.

Every estoppel, says Lord Coke, because it concludeth a man to allege the truth, must be certain to every intent, and not be taken by argument or inference: 2 Inst. 352 f.

Estoppels *in pais* seem in their common-law origin to have arisen only in the case of those solemn and peculiar acts, to which the law gave the power of creating a right or passing an estate, and attached as much efficacy and importance as to matters appearing by deed or of record: 2 Smith's Lead. Cas. 561.

The doctrine of estoppels *in pais* has, however, by recent decisions, both in courts of law and equity, been subject to very material modifications, and its principles given a much broader application. Instead of being deemed odious, as formerly, it is found conducive to honesty and fair dealing.

Admissions which have been acted upon by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party. For, in the latter case, the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations: 1 Greenl. Ev., sec. 207.

In *Gregg v. Wells*, 10 Ad. & El. 90, Lord Denman lays down the rule thus: "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against a person whom he has himself assisted in deceiving."

It is believed that the doctrine above cited must be received with some modification and limitation.

In *Storrs v. Barker*, 6 Johns. Ch. 167 [10 Am. Dec. 316], the rule of equity is thus stated: "Where one having title acquiesces knowingly and freely in the disposition of his property, for a valuable consideration, by a person pretending to title and having color of title, he should be bound by that disposition of the property; and especially if he encouraged the parties to deal with each other in such sale and purchase. It is deemed an act of fraud for a party cognizant all the time of his own right to suffer another party to go on under that ignorance and purchase the property, or expend money in making improvements upon it."

To justify the application of this principle, it is material that the party should be fully apprised of his rights, and should, by his conduct or gross negligence, encourage or influence the purchaser; for if he is wholly ignorant of his rights, or the purchaser knows them, or if his act or negligence or silence do not mislead, nor in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part: 1 Story's Eq. Jur., sec. 386.

To maintain this equitable estoppel, the party setting it up must be able to show, by averment and proof, that he has been injured by the deception and fraudulent conduct of the other party: *Morris v. Moore*, 11 Humph. 433.

In the *Welland Canal Company v. Hathaway*, 8 Wend. 433, Nelson, J., thus states the rule: "As a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence, and when such denial will operate to the injury of the latter."

Before the party is concluded, it must appear: 1. That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim he proposes to set up; 2. That the party has acted upon the admissions; 3. That he will be injured by allowing the truth of the admissions to be disproved: *Per Bronson*, J., in *Dessell v. Odell*, 3 Hill (N. Y.), 216. The same doctrine is affirmed in *Carpenter v. Stilwell*, 12 Barb. 128.

In *Whitaker v. Williams*, 20 Conn. 98, Storrs, J., remarks: "The doctrine that one shall not be permitted to retract representations in which is included conduct by which he has induced another to adopt a particular course of action, supposes, and it is to be understood with the qualification, which is indeed a part of the principle itself, that the one by whom such representations were made had a knowledge of his rights. The principle which constitutes such representations an estoppel *in pais* also requires that the action of the other party took place on the strength of them."

In *Copeland v. Copeland*, 28 Me. 525, it was held to be well settled at law, as well as in equity, that when one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

This doctrine was affirmed in *Stevens v. McNamara*, 36 Me. 176 [58 Am. Dec. 740]. A rule substantially the same prevails in Massachusetts: *Parker v. Barker*, 2 Met. 423; *Brewer v. Boston & W. R. R. Co.*, 5 Id. 478 [89 Am. Dec. 694]. In the latter case, Wilde, J., says: "A party is not estopped to prove a legal title to his estate by any misrepresentation of its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective; for he may require a warranty, and it would be most unjust that a party should forfeit his estate by mistake."

It will be perceived that the rule by which a party is estopped *in pais* is by no means uniform. There are certain elements in which all the cases concur; in others they are variant. Thus, some require full knowledge of his rights on the part of the party sought to be estopped, while others omit that element; some requiring that the party who seeks to enforce the estoppel has been injured by the fraudulent acts or concealment of the other party; others do not. Probably no technical rule will be found applicable to all cases. Much must be left to the discretion of the judge in applying the principle to the facts in particular cases.

When a party, with a full knowledge of his own rights, by his silence intentionally permits others to be deceived and misled in relation to them, he will not afterwards be authorized to interpose his claim to the prejudice of the parties thus deceived and misled. Silence, under such circumstances, is assent. By that assent, good faith and fair dealing require that he should be bound.

But the silence of a party who is ignorant of his rights ought not to operate to his prejudice. He, then, cannot be expected to speak. If, however, a party, when ignorant of his rights, induce others, equally ignorant, by his active interference, to pursue a particular course, he ought not afterwards to be permitted to allege facts inconsistent with and injurious to the rights acquired at his instigation and by his procurement. He is estopped in that case, not on the ground of fraud, but on the ground that when one of the innocent persons must suffer, the loss should fall upon the one by whom it was occasioned.

In the case at bar, there is no evidence that the plaintiff made any affirmative representations as to his title to the *locus in quo*. At most, he was silent when the divisional line was pointed out. The rule laid down by the court was therefore defective in

this, that it did not require the jury to find that he had knowledge, at the time, where the true line was in fact located; and also, that it did not require the jury to find that the defendants were induced to purchase, and did purchase, in consequence of the silence or acts of the plaintiff. In view of the evidence before the jury, we think these considerations might have had an influence on their minds, and we cannot say would not have controlled their verdict.

For this cause there must be a new trial.

As to the other instructions given, or those withheld, no error is perceived. No question as to the form of the pleadings seems to have been raised at the trial. Such questions cannot, therefore, properly be considered here. If the brief statements of the defendants are defective, they may be amended before proceeding to trial, without prejudice to either party.

It becomes unnecessary to consider the motion.

Exceptions sustained, verdict set aside, and new trial granted.

ESTOPPEL BY SILENCE, CONCEALMENT, OR MISREPRESENTATIONS: See *Chautauque Co. Bank v. White*, 57 Am. Dec. 452, note; *Owen v. Myers*, Id. 593; *Berham v. Turbeville*, Id. 782; *Jessett v. Miller*, 61 Id. 751, and note 756.

THE PRINCIPAL CASE IS CITED in *Smith v. Newton*, 38 Ill. 236, to the point that admissions, to create estoppel *in pais*, must have been intentional, and to have misled another to his prejudice.

INHABITANTS OF FREEDOM v. WEED.

[40 MAINE, 282.]

TOWN CANNOT MAINTAIN ACTION FOR INJURY TO HIGHWAY by destruction of a bridge which is a part thereof, the highway being one which it is bound to keep in repair, unless the town has repaired it, or incurred some expense or disbursement in consequence of such wrongful act.

CASE. The opinion states the facts.

Heath and A. T. Palmer, for the plaintiffs.

N. Abbot, for the defendant.

By Court, **TENNEY, J.** The action is case for an alleged injury to a bridge upon a county road in the town of Freedom, no attempts having been made to repair the injury, and consequently no expense having been incurred by the town by reason thereof.

In the case of *Inhabitants of Calais v. Dyer*, 7 Greenl. 155,

which was a complaint, under the statute, for flowing a road, and thereby doing an injury thereto, by the defendant, the court held the remedy sought to be inappropriate, and say: "The town is not seised of the land covered by the road, and then by the water. The land belongs to the original owner, his heirs and assigns, subject to the public easement, which has been impaired and damaged. * * * The easement is a public one, and it cannot be considered, in a legal point of view, the town's easement or property;" and though the easement belongs to the public, it is the duty of the town to preserve and continue it. The town, therefore, seems entitled to damages, by way of reimbursement.

In *Inhabitants of Andover v. Sutton*, 12 Met. 182, which was trespass on the case to recover expenses which the plaintiffs had incurred in repairing a highway injured by being flowed by the defendants, the court said in the opinion: "It is a public highway, in which every citizen has an easement, and no one to the exclusion of another. The town, in the distribution of the public burdens, is bound to maintain that portion of the highway which is within its territorial limits; but in its corporate capacity, it neither owns the soil nor the easement. * * * But the town has sustained a damage in being compelled to repair the defect caused in the road by the act of the defendants in erecting their dam and raising their head of water and overflowing the road. * * * By doing the damage complained of at the expense of the plaintiffs, who were compelled by law to repair the road, they are, by force of the same law, liable to make good the damage which the plaintiffs have sustained by their act."

In these cases it is upon the ground that the towns had expended means in making repairs, which they were bound to make, that the cause of action against those who caused the injury arises. The actions are sustainable for the purpose of obtaining reimbursement.

The case of *Inhabitants of Monmouth v. Gardiner*, 35 Me. 247, was an action at common law for overflowing a public road which the plaintiffs were bound to keep in repair. This case may at first seem to favor the proposition that a right of action exists in such a case, by the mere fact that the highway was injured by the acts of the defendant. But on examination it will be found that no such question was presented at the trial, and nothing appears which shows that the town had not repaired the injury before the institution of the suit. The legal questions raised in that action were upon other and very distinct facts from those presented in this case.

The question involved in this case is, whether a town can maintain an action for an injury to a highway therein, caused by an individual, without having been put to expense in any manner in consequence thereof. Roads are sometimes so little used that they are suffered without complaint to remain for a long time much out of repair, and no money has been appropriated by the town for their improvement. For a trifling injury on such a road, can the town maintain an action for damages against the one who did it, when it has done nothing to restore it to the condition in which it was before the injury? If an obstruction was wrongfully or negligently placed in a highway by an individual, which caused a serious injury to another, and was then removed without the agency of the officers of the town where it was placed, by making out the necessary proof in an action against the town, the injured party would be entitled to damage. But if no claim were made by him against the town, it certainly could not maintain a suit against the individual who caused the injury by the obstruction. The exposure of the town to expense is insufficient for the maintenance of an action in such a case; and it is apprehended that the exposure to pay a fine for the repair of a road which has been damaged by an individual can give no greater right to the town to sustain an action on account of such exposure. The town may neglect to repair the way, and it may not be called upon in any mode to incur the expense of restoring it to its former state. Being under no obligation by a contract to make repairs, it is not in a situation to call for the payment until there has been something in the nature of a disbursement.

Exceptions overruled.

RICH, J., concurred in the result only.

TOWN MAY RECOVER DAMAGES FOR INJURY TO HIGHWAY by destruction of bridge: See *Troy v. Cheshire R. R. Co.*, 57 Am. Dec. 177, and cases cited in note 190.

SMITH v. POOR.

[40 MAINE, 415.]

DIRECTORS OF CORPORATION, FOR FRAUD AND MISCONDUCT IN OFFICE, are liable to the corporation.

STOCKHOLDER IN CORPORATION CANNOT MAINTAIN ACTION AGAINST DIRECTORS to recover compensation for damage suffered in a contract made by him with such corporation through the fraudulent votes and acts of such directors, his remedy being properly against the corporation itself.

STOCKHOLDER CANNOT MAINTAIN BILL TO COMPEL DIRECTORS TO ACCOUNT
where they fraudulently abuse their trust, unless it first appear that the corporation, as such, refuses to sue, or that the acting directors are the parties guilty of the fraud.

TRESPASS on the case. The plaintiff alleges that he entered into an agreement with the Portland Gas Light Company, of which defendants were directors, to build certain works for the company, but that defendants, as such directors, illegally combined to injure plaintiff, and to prevent him from completing his contract. Plaintiff was also a stockholder in the company, and further alleged that as such directors the defendants, by illegal and fraudulent acts and votes, damned him in his interest as such. Defendants demurred to the declaration, and thereafter a nonsuit was entered. Plaintiff excepted. The further facts appear in the opinion:

Smith, in propria persona.

Shepley and Dana, for the defendants.

By Court, **APPLERON**, J. The Portland Gas Light Company are responsible to the plaintiff on any and all contracts it may have made with him, to the extent of any damage he may have sustained in consequence of any violation of such contract or contracts on its own part.

The directors of a corporation are chosen by the votes of the corporators, are the agents of the corporation, and are responsible to it for official misconduct and fraud in the discharge of their duties. The amount which may be recovered by the corporation, in a suit for official delinquency, will in each case constitute a portion of its assets, in which each corporator will have an interest in proportion to his share of the whole stock: *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. 130.

The plaintiff, being a member of the corporation, and having made a contract therewith, claims compensation of the defendants, its directors, for certain alleged fraudulent acts and votes, by reason of which he has been damned in his various relations with the corporation. It was held in *Smith v. Hurd*, 12 Met. 371, that a stockholder in a bank could not maintain an action against its directors for negligence in so conducting its affairs that its whole capital was wasted and lost, and the shares therein rendered worthless; nor for the malfeasance of the directors in delegating the whole control of its affairs to the president and cashier, who wasted and lost the whole capital. The decision in that case rests upon well-established principles,

and has a direct and important bearing adverse to the maintenance of the suit now before us.

The directors who fraudulently abuse their trust and misapply the funds of the corporation are personally liable as trustees to make good that loss. But the stockholders cannot maintain a bill to compel them to account, unless it first appear that the directors refuse to prosecute the suit, or the present directors are the parties who made themselves answerable for the loss. In all cases the corporation is a necessary party, either as complainants or defendants: *Robinson v. Smith*, 3 Paige, 222; *Hershey v. Veasie*, 24 Me. 9 [41 Am. Dec. 364]; *Cunningham v. Pell*, 5 Paige, 607.

The plaintiff, so far as he was entitled to his certificates of stock, might vindicate his rights by suit against the corporation, in case of the wrongful refusal of their officers: *Gray v. Portland Bank*, 3 Mass. 363 [3 Am. Dec. 156]. If a corporation refuse to permit a transfer of stock upon their books, they are liable in *assumpsit*: *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348 [34 Am. Dec. 317]. If dividends are illegally withheld, the remedy of the party aggrieved is by a suit against the corporation, and not against its officers: *French v. Fuller*, 23 Pick. 108.

In case of a fraudulent abuse of trust on the part of the president and directors of an incorporated banking company in the election of directors, it seems that the new directors may be restrained from the exercise of their powers by injunction: *Ogden v. Kip*, 6 Johns. Ch. 160. In *Commonwealth v. Arrison*, 15 Serg. & R. 127, it was held that in this country information may be freely used for trying the right to offices in public as well as in private corporations. A writ of *mandamus* will be granted to restore directors of a banking corporation who were refused the exercise of their rights as directors by a majority of the board: *Angell & Ames on Corp.*, c. 20, sec. 702. So the writ will be granted where the member of a company was illegally removed: *Delacy v. Neuse River Navigation Co.*, 1 Hawks, 274 [9 Am. Dec. 636]. In *Ex parte Desdoity*, 1 Wend. 98, illegal votes were cast at an election of directors, by which votes certain persons were elected, and without them certain other persons were elected. The court, upon application, say the election by the illegal votes was void, and that the other election without those votes was legal and binding. The authority to issue a *mandamus* to corporations and individuals, when necessary for the furtherance of justice, is expressly given by the revised statutes,

chapter 96, section 5. It likewise exists at common law: *Smyth v. Tilcomb*, 31 Me. 272. Assuming, therefore, the votes complained of to have been cast illegally, as is alleged, the rights of those directors chosen by legal votes would, upon proper process, have been fully affirmed.

So far as the plaintiff may have sustained damages as a contractor with the Portland Gas Light Company, in consequence of any breach on its part of its contract with him, he has the ordinary legal remedies against the same, and in a proper suit may recover all to which he may be legally entitled. It seems by the declaration that he has commenced such suit, and that the parties have referred "all demands and claims and controversies" between them, and that he has obtained an award upon the same in his favor. By that award it would seem that "all demands and claims and controversies between the parties" have been finally determined. In this writ he claims damages against the defendants because the corporation have not complied with this award. If it has not been adjusted, the plaintiff is entitled to the ordinary process of law against the corporation, and in case of its insolvency, to the remedy provided by statute against the stockholders of the corporation. As a creditor of the corporation, the plaintiff is entitled to the same remedies as its other creditors. His claims are directly against the corporation, and to be enforced against it.

The general propositions already discussed embrace the various grounds of complaint set forth in the plaintiff's writ, and sufficiently indicate the reasons why, upon legal principles, this action is not maintainable.

The plaintiff's contract with the corporation was dated October 29, 1849. The various acts of which complaint is made are alleged to have been done by the defendants under color of their office as directors, and cover a period of over three years. Most of the grounds of complaint, such as fraudulently preventing the plaintiff from performing his contract, neglecting to collect the installments when due, and to pay over the moneys collected, and the fraudulently issuing stock, and allowing the same to be voted upon, etc., occurred prior to July, 1851, when the defendant McCobb was chosen director. All the illegal acts before that time done under color of office were without his participation. The demurrer to the declaration is by all the defendants. The defendant McCobb cannot be held responsible for acts to which it appears by the plaintiff's own showing he was not a party. If all the allegations in the declaration

are omitted as to facts occurring before the election of McCobb, and for which he cannot be held answerable, the declaration would be fatally defective. There is no allegation in the writ so connecting the defendant McCobb with the proceedings before his election as to show that he should be held justly liable for those occurring subsequent thereto. As to the latter, there is no sufficient declaration. The writ contains but one count, and sets forth no legal cause of action. The declaration must be adjudged bad.

Declaration bad.

LIABILITY OF DIRECTORS OF CORPORATION TO STOCKHOLDERS AND CREDITORS: See *Hershey v. Vassie*, 41 Am. Dec. 364, and cases cited in note 367-370; also *Hedges v. New England Screw Co.*, 53 Am. Dec. 624, and note collecting many cases, and containing full discussion of the subject, 637-651.

THE PRINCIPAL CASE IS CITED in *Peabody v. Fleet*, 6 Allen, 57; *Talcott v. Township Pine Grove*, 1 Flip. 149; *Donovan v. Dean*, Id. 186; *Smith v. Poor*, 3 Ware, 152, to the point that the remedy of a stockholder for injury through breach of directors' trust is by action against the corporation, and not personally against the directors.

PRINCE v. OCEAN INSURANCE CO.

[40 MAINE, 481.]

MASTER OF INSURED VESSEL, WHICH BECOMES DISABLED, IS AUTHORIZED TO SELL HER when for the best interest of those concerned, and whether he was justified in selling in a particular case is a question to be determined by the circumstances and condition of the vessel at the time and place where the sale was made.

SURVEY UPON DISABLED VESSEL IS PRESUMED TO BE CORRECT, but is not conclusive, as it does not control the rights of the parties, but is to be considered as an important transaction, designed to protect the rights of all interested.

MASTER, TO JUSTIFY SALE OF DISABLED VESSEL, MUST SHOW that such sale arose from necessity, which imports no more than a faithful performance of the duty imposed on him to make that decision, when a vessel is injured, which will best promote the interests of all for whom he has become agent.

INSTRUCTIONS TO JURY AS TO NECESSITY UNDER WHICH MASTER MAY EVERT SALE of disabled vessel requires no particular form of words, but is sufficient if the jury is given to understand that to justify such sale the master, under the circumstances, acted for the best interests of all concerned; and an instruction that there must be an apparent necessity for the sale, existing at the time and place, is sufficient without any further qualification to intensify the term "necessity."

MASTER OWNING PART OF DISABLED VESSEL SOLD ON ACCOUNT OF INJURY is justified in making such sale under the same circumstances which would justify him if he were not such part owner.

ABANDONMENT OF INSURED VESSEL IS NOT NECESSARY, where sale is made on account of injury, to enable assured to recover for a total loss.

Assump~~t~~ on a policy of insurance on a bark, which was injured on her voyage by striking on a rock. At the instance of the master, at the time of the injury, a survey was had, and the vessel deemed to be too much injured to proceed farther on her voyage. Whereupon the master, as agent of the underwriters, sold her for six hundred dollars. The general issue was pleaded and joined. Among the instructions requested and given on the trial, the court gave the following, viz.: A survey is presumed to be correct, but is not conclusive; it does not control the rights of the parties, but is to be considered as an important transaction, designed generally to protect the rights of all interested. Where a vessel is so injured that a sale is necessary and justifiable, and is so had that it passes the title, no abandonment is necessary. Among the instructions requested, those mentioned in the opinion as the fourth and fifth were in substance as follows, viz.: That to constitute such a necessity as would authorize a master to sell his vessel, it must be apparently as much totally lost as if she were destroyed in fact, or that there was no reasonable chance of saving any part of her for the insurers, except by selling her. Verdict was rendered for plaintiff for a total loss. Defendant excepted. The further facts necessary to an understanding of the case are stated in the opinion.

Fessenden and Buller, for the defendant.

Shepley and Dana, for the plaintiff.

By Court, SHEPLEY, C. J. The plaintiff claims to recover for a total loss of five sixteenth parts of the bark St. Lawrence. That vessel, being on a voyage from New York to Aspinwall, on May 19, 1853, appears to have struck a coral reef in Navy bay, by which a small piece of the rock penetrated in one place entirely through her bottom, and in two other places nearly through. She appears to have proceeded to her port of destination, where her cargo was discharged.

On the thirtieth day of the same month a survey upon her, called through the agency of the American consul, reported that her keelson was broken and settled some three inches, that her port bilge was raised some four inches, that her keel, so far as it could be seen, was much broomed, and the copper torn off. The persons called to make the survey appear to have been competent and impartial. One was an officer in the United States navy, having been employed in the merchant service and then having the command of a steamer, one of the others to have been a present, and the other a past, ship-master. They agreed upon a

result, stating that it would cost much beyond the value of the bark to heave her out and make the requisite repairs in that bay. There is a difference in the testimony whether it would have been safe or prudent to have proceeded with her to a place where her bottom could have been examined and repairs made. The master caused her to be sold at auction. The purchaser appears to have sent her with a cargo to Baltimore, without making any, or any important, repairs.

The authority of a master to sell his vessel or cargo, under any circumstances, was not admitted by the ancient maritime law.

As commerce and navigation increased and extended, it was perceived that masters, without fault, might be so situated that they could not consult any person interested, and that they must abandon the property as wholly lost, or sell what remained of it. The authority to sell was fully conceded by the mercantile law. The remaining difficulty was to so define and limit that authority that its abuse might be prevented. For this purpose different language appears to have been used in different judicial judgments.

It may be useful to notice that used in some of the leading cases in England and in this country, to ascertain whether any particular language is required to be used, and if so, what it is.

Lord Mansfield, in his opinion in the case of *Milles v. Fletcher*, Doug. 231, says: "I left it to the jury to determine whether what the captain had done was for the benefit of the concerned." The captain had sold part of the cargo, and had attempted to sell the vessel without success, and had left her to be sold.

Lord Ellenborough, in the case of *Hayman v. Molton*, 5 Esp. 65, speaking respecting the sale of a vessel by the master, says: "Where a case of urgent necessity and extraordinary difficulty occurs, where a ship has received irremediable injury, I am disposed to go as far as I can to support what has been contended for by Mr. Erskine, that under such circumstances, the captain acting *bona fide*, and for the benefit of the owners, might sell the ship for the benefit of the owners. This is the disposition of my mind; but I cannot lay it down as positive law. At all events, it can only be justified by extreme necessity and the most pure good faith; that is, if the vessel is in such a state as it would be probable the owners themselves, if on the spot, would have acted in the same way as the captain has done, and have sold the ship, I shall therefore leave it to the jury to say

whether, in this case, there was such a necessity as called upon the captain, acting for the benefit of his owners, to sell the ship." The case of *Milles v. Fletcher*, Doug. 281, does not appear to have been noted by the court or counsel.

Lord Stowell in the case of the *Fanny and Elmira*, Edw. Adm. 117, says: "In the first place, it must be shown that there was a necessity, and then it remains to be considered whether it was such as would, by law, give the master a right to sell."

Mr. Justice Parke, in the case of *Cannon v. Meadburn*, 1 Bing. 243, says: "Nothing, therefore, but extreme necessity will justify the master in disposing of the cargo."

Gifford, C. J., says, in the case of *Robertson v. Clarke*, 1 Bing. 445: "This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity; that it must be *bona fide* for the benefit of all concerned."

The question has been presented several times in the supreme court of Massachusetts. Parker, C. J., in the case of *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249, says: "It is certain that a master of a vessel, as such, has no authority to sell the vessel or cargo, unless in a case of extreme necessity."

Putnam, J., in the case of *Hall v. Franklin Ins. Co.*, 9 Pick. 466, after quoting the language referred to in the last case, says: "There must be something more than expediency in the case; the sale should be indispensably requisite."

The same justice, in the case of *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543, remarked: "It is for the plaintiff to prove the legal necessity. * * * They must maintain that there was good intention on the part of the master, and that he was compelled by the necessity of the case to act."

Shaw, C. J., in the case of *Peirce v. Ocean Ins. Co.*, 18 Pick. 88 [29 Am. Dec. 576], having referred to the former cases as settling the law, says: "Here is not that imperious, uncontrollable necessity for a sale which is requisite to confer such an authority on a master."

The question has, at different times, been presented in the courts of the United States.

Mr. Justice Story, in the case of *The Schooner Tilton*, 5 Mason, 465, says: "My judgment is, upon the most careful survey of the authorities, as well as upon general principles of law, that the master has a right to sell the ship in cases of urgent necessity. * * * I adopt the argument at the bar, that it must be proved that there was a pressing necessity to justify the sale."

The same justice, in the case of *Pope v. Nickerson*, 3 Story, 465, says: "He had no right to sell the same, unless in case of necessity; that is, of a moral necessity, to prevent a greater loss to the shippers."

So he had before stated in the case of *Robinson v. Com. Ins. Co.*, 3 Sumn. 226: "The master has an authority to sell only in cases of extreme necessity; not indeed of physical necessity, but of moral necessity."

In the case of *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, the plaintiff's counsel appear to have submitted a request for instructions that the sale should be found to be "absolutely necessary and for the interest of all concerned." While the defendant's counsel requested instructions that "no necessity will justify a sale by the master unless it be urgent and inevitable; in other words, justifiable." The instructions prayed by each were given.

Arnould states the law thus: "It is obvious that nothing but a case of absolute and extreme necessity, such as sweeps away all ordinary rules before it, can justify the master in such a sale:" *Arnould on Ins.* 89.

Kent states: "The master of an insured ship, injured by the perils of the sea and not competent to complete the voyage, may sell her in case of necessity; as where the ship is in a place in which she cannot be repaired; or the expense of repairing would be extravagant and exceed her value; or he had no means in his possession and was not able to raise any:" *3 Kent's Com.* 382.

Phillips says: "The authority of a master in case of extremity to sell a disabled ship rests upon much the same principles as that to raise funds on bottomry. * * * The master is authorized to manage and dispose of the ship and cargo in the same manner as a prudent owner would do in like circumstances, being influenced by predominating motives to prosecute the voyage:" *2 Phill. Ins.* 305.

Lord Eldon is reported to have stated, in the case of *Smith v. Robertson*, 2 Dow. P. C. 479: "The very ground upon which the authority rests, namely, extreme necessity, is pregnant with uncertainty; as the facts which create it will vary in their effect upon minds differently constituted."

Mr. Justice Putnam, in the case of *Hall v. Franklin Ins. Co.*, 9 Pick. 466, says: "We mean a necessity which leaves no alternative; which prescribes the law for itself, and puts the party in a positive compulsion to act."

Lord Stowell had before stated, in the case of *The Gratitude*, 3 Rob. Adm. 240: "The law of cases of necessity is not well furnished with precise rules; necessity creates the law; it supersedes rules; and whatever is just and reasonable is likewise law."

Mr. Justice Story also attempted to explain the meaning of "necessity" as thus used; he says, in the case of *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. 226: "By moral necessity, I mean not an overwhelming and irresistible calamity or force, but a strong and urgent, and if one may so say, a vehement, exigency, which justifies and requires the sale to be made as a proper matter of duty to the owner, to prevent a greater sacrifice or a total ruin of the property."

Tindal, C. J., had before said, in the case of *Somes v. Sugrue*, 4 Car. & P. 276: "A great deal has been said about the word 'necessity'; undoubtedly it is not to be confined to or so strictly taken as it is in its ordinary acceptation. There can in such case be neither a legal necessity nor a physical necessity; and therefore it must mean a moral necessity; and the question will be, whether the circumstances were such that a person of prudent and sound mind could have a doubt as to the course he ought to pursue."

With all these explanations, the necessity which authorizes and requires the master to sell, being a moral necessity, can be, when carefully examined, no more than a faithful performance of a duty imposed by the circumstances in which he is placed. Being called upon, from the best information to be obtained respecting the actual condition of his vessel and respecting the danger of allowing her to remain as she is, and the danger and expense of repairing her there and of proceeding elsewhere, to determine whether he must abandon her as a wreck, or repair her, or attempt to obtain something for her by sale or otherwise, he is under moral obligation to pursue that course and make that decision which will best promote the interests of all for whom he has become the agent. He must do wrong if he does not do so. He has no alternative left, and must sell, if in the faithful discharge of that duty he determines that the calamity will be most alleviated and the interests of all be best served by a sale. A moral necessity for a sale can mean no more.

The inquiry arises in this case, What idea would be presented to the minds of jurors by instructing them that there must be an absolute, urgent, pressing, imperious, uncontrollable, extreme, and inevitable moral necessity to authorize a sale? If an explanation were asked by a juror of the meaning, might the

answer be, It means that he must act faithfully and discharge his duty to all; the necessity is a necessity to sell, if he could not so act for all without doing it. There is a fact underlying this moral necessity or duty, from which alone it can arise, that the vessel has been so disabled as to render it unsafe for her to proceed on her voyage as she is. This fact must be established before the master's authority is so enlarged that he becomes the agent of all concerned, and clothed with power to judge for all what must be done for their good.

With respect to the authority of the master to sell, the jury were in this case instructed that "the question turned upon what transpired at Navy bay, and not upon what occurred afterwards." This will be found to be the settled rule of law, as stated in the authorities cited. The instructions respecting the effect of the surveyor's report, and the lack of proof of abandonment, are also fully sustained by authority.

The principal complaint rests upon the instructions respecting the right of the master to sell the vessel. One especial cause is, that no adjective was used as connected with the word "necessity," to increase or intensify its meaning.

In the case of *Milles v. Fletcher*, Doug. 231, the word "necessity" does not appear to have been used. Lord Mansfield, in the opinion, says: "The captain, when he came to New York, had no express order, but he had an implied authority from both sides to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within the contract of indemnity."

In the case of *Idle v. Royal Exchange Assurance Co.*, 8 Taunt. 755, Dallas, C. J., says: "The authority of *Milles v. Fletcher* has been recognized in a great number of subsequent cases, and has never, that I am aware of, been in the slightest degree impeached."

In the case of *Patapeco Ins. Co. v. Southgate*, 5 Pet. 604, adjuncts to the word "necessity" were freely used, and yet it is stated in the opinion that the doctrine of the case of *Milles v. Fletcher, supra*, "has been repeatedly sanctioned by the later decisions both in England and in this country."

In the case of *Hayman v. Molton*, 5 Esp. 65, while urgent necessity is spoken of, the case appears to have been left to the jury without any expletive to find "whether there was such necessity as called upon the captain, acting for the benefit of his owners, to sell the ship."

In the case of *Greene v. Royal Exchange Assurance Co.*, 6 Taunt. 68, the opinion states: "It ought, therefore, to have been left to the jury whether a prudent man would have sold the ship in these circumstances, or have repaired her, and proceeded with her to earn what he could."

In the case of *Robertson v. Clarke*, 1 Bing. 445, the question left by the instructions to the jury appears to have been to find "whether they thought the captain justified in selling the vessel under the circumstances which had been proved; and [he] told them if they thought the sale a matter of necessity, they must find for the plaintiff."

In the case of *Cambridge v. Anderton*, 2 Barn. & Cress. 691, Abbott, C. J., told the jury that "if, under the circumstances in evidence, they thought the ship was not repairable at all, or that when repaired she would not be worth the expense of doing the repairs, the plaintiffs were entitled to recover for a total loss."

In the case of *Somes v. Sugrue*, 4 Car. & P. 276, Tindal, C. J., in his instructions to the jury, is reported to have said: "The only question in this case is whether, under the circumstances, there has or has not been a total loss of the vessel, if at all, in consequence of the sale, and that will depend upon whether the sale was a sale that was necessary for the benefit of the parties concerned. * * * A captain has no power to sell except from necessity, considered as an impulse acting morally to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. * * * If you think that if the owner himself had been on the spot uninsured, he, in the exercise of sound discretion, would have repaired the vessel, or that if an agent of the underwriters had been there he, exercising such discretion, would have repaired, then this captain ought certainly to have done so. But if they would not have done so, then, I think, this captain was not compellable to repair, and the sale, in such case, will have taken place under a justifiable necessity."

In the case of *Hunter v. Parker*, 7 Mee. & W. 322, the questions on this point as left to the jury were "whether the master in selling the ship had acted *bona fide*, and with the intention of doing the best for the advantage of the owners and of all parties concerned," and "whether there was an actual necessity for the sale."

In the case of *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249, although it is incorrectly said all "the judges who have adverted to this subject, except Lord Mansfield, have put the authority of the master to sell upon extreme necessity," yet the same judge,

when he comes to state definitely what the instructions to the jury should have been, uses this language: "The instruction should have been, that if they were satisfied from all the evidence, giving due weight to the opinion of the surveyors, that the sale was necessary, then the sale constituted a total loss." These instructions prescribed must have been carefully considered, for the case was to be presented for a new trial, and the very language might be expected to be used on that trial in instructions to the jury.

It is not common to find different persons using the same language to communicate the same idea. An examination of the decided cases shows that the omission of any epithet in connection with the word "necessity" cannot be considered erroneous.

It is on the circumstances ascertained by the best information, as they are presented at the time, that the surveyors and master must act and decide. "An apparent necessity for it existing at the time," could communicate no other idea to the jury than a necessity which appears to exist at the time. The intention appears to have been to inform the jury that they were to judge of the necessity of the sale upon the proof of the circumstances as they were presented to the master. This would be correct. And it is not perceived that they could have been led into any erroneous judgment by the use of that language. The question is not, whether it was the best suited and most appropriate which could have been used, but whether the jury could have been led into any misapprehension of duty by its use. The presiding judge had most respectable authority for its use.

In the case of *Freeman v. East India Company*, 5 Barn. & Ald. 617, Abbott, C. J., says: "And under these circumstances, a sale of the cargo or any part of it by the master could confer no title on the purchaser, unless there was an apparent necessity for such sale. That question I left for the jury, and they were clearly of opinion that there was in this case no such apparent necessity." In that case Holroyd, J., speaks of an absolute necessity for a sale; and Best, J., says: "The case of absolute necessity constitutes the only exception to the general rule." And yet he says: "I think the case was properly left to the jury, and that there ought to be no rule granted." No important distinction appears to have been presented to their minds in the use of the words "absolute necessity" and "apparent necessity." They appear to have regarded them as different forms of language to communicate the same idea.

Mr. Phillips, when stating the result of the decided cases, uses this language: "A sale, whether by the owner or master,

will be justified or not in respect to the underwriters according to the apparent circumstances when attentively and fairly examined and considered; the estimates, opinions, and advice of competent persons who can be consulted being first obtained; and not according to the result of an experiment of the purchaser in floating, recovering, and repairing the vessel." 2 Phill. Ins. 307.

The other instructions on this point appear to have been taken from, or to have been authorized by, the decided cases already noticed. The testimony on this point was quite different, and not easily reconcilable. It was especially within the province of the jury to decide upon it. There is no motion to set aside the verdict as having been found against the evidence. Nor is it intended to intimate that it could have been of importance, for it is the duty of the jury, and not of the court, to decide upon the credibility of testimony.

The first and second requested instructions appear to have been based upon the position that the master, being a part owner, would not have the same authority as a master who was not an owner. The settled law is otherwise. "Whether the sale be by the owner or the captain will make no difference if the circumstances justified the selling, and the sale was honestly and fairly conducted." *Idle v. Royal Exchange Assurance Co.*, 8 Taunt. 755.

The third request was for instruction that there should be such an imperious and uncontrollable necessity as left no other reasonable course to be adopted. Although the language used in the request may have been selected from the opinion in the case of *Peirce v. Ocean Ins. Co.*, 18 Pick. 83 [29 Am. Dec. 576], it has become apparent from an examination of the decided cases that the law does not require the use of any form of words or of any adjuncts to intensify the word "necessity." The jury would be instructed, without the use of any such words, that there must be a necessity that left no alternative, or other course to be pursued consistently with a faithful discharge of duty, and that is all which the law requires.

The fourth and fifth requested instructions would have deprived the master of authority conferred upon him by law, as exhibited in all the well-considered cases.

Exceptions overruled.

INJURED VESSEL, WHEN MAY BE SOLD BY MASTER: See *Mutual Safety Ins. Co. v. Cohen*, 43 Am. Dec. 341, and cases cited in note 345.

THE PRINCIPAL CASE IS CITED in *Mt's v. The Galliot Amelie*, 2 Cliff. 444, to the point that necessity must be shown to authorize master to sell injured vessel.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

DEAL v. HARRIS.

[3 MARYLAND, 40.]

NEITHER JUSTICE OF PEACE NOR PLAINTIFF IN JUDGMENT BECOMES TRESPASSER by enforcing a judgment of the former which remains unrescinded and unpaid; although such judgment may be erroneous if the justice had jurisdiction of the case in which it was rendered.

DEFENDANT'S DISCHARGE UNDER INSOLVENT LAWS DOES NOT NECESSARILY SHOW WANT OF JURISDICTION on the part of a justice of the peace to render a judgment against him for a cause of action that accrued prior to his application for the benefit of such laws.

Assault and battery, and false imprisonment, brought by the appellant against the appellee. The pleas were *non cul.* and justification under a writ of *ca. sa.*, and a commitment thereon, issued by a justice of the peace, upon a judgment rendered by him in favor of the defendant and against the plaintiff, on the fourteenth day of February, 1851. The plaintiff replied that on the fifth of April, 1850, he applied for the benefit of the insolvent laws, and in the following September obtained his final discharge thereunder; that the cause of action on which the judgment mentioned in the plea was recovered accrued before the date of his said application; that at the trial before the justice he pleaded and produced his final discharge under said laws; that the *ca. sa.* and commitment were based upon the judgment so rendered by said justice, and that he could not be rightfully arrested and imprisoned for the non-payment of the sum of money in said judgment mentioned. The defendant demurred to this replication, on the ground that the judgment of the justice, having been rendered by a court of competent

jurisdiction, was conclusive upon the parties to it and could not be impeached for informality, error, or mistake, so long as it remained in force. The court sustained this demurrer, and gave judgment thereon for the defendant, and the plaintiff appealed.

William P. Mawisby, for the appellant.

Joseph M. Palmer, for the appellee.

By Court, EGGLESTON, J. In treating of what kind of erroneous proceedings will sustain an action like the present, the authorities recognize a distinction, in some respects, between the proceedings of courts of general jurisdiction and of tribunals having but limited powers. It is said, however, in 1 Ch. Pl., ed. of 1851, p. 181: "In general, no action whatever can be supported for any act, however erroneous, if expressly sanctioned by the judgment or direction of one of the superior courts at Westminster, or even by an inferior magistrate, acting within the scope of his jurisdiction." Notwithstanding there may be exceptions to the general rule thus stated, yet it is certainly true that if the inferior judge has jurisdiction, although he may give a wrong judgment, provided the error results from the erroneous conclusion at which he arrives, neither the judge nor the plaintiff in the judgment can be made a trespasser by virtue of enforcing the same, if the judgment remains unrescinded and unpaid: *Id.*; *Ackerley v. Parkinson*, 3 Mau. & Sel. 425-428; *Putnam v. Man.*, 3 Wend. 205 [20 Am. Dec. 686]; *Relyea v. Ramsay*, 2 Id. 604; *Horton v. Auchmoody*, 7 Id. 203, 204; *Elliott v. Peirsol*, 1 Pet. 340.

In *Perkin v. Proctor*, 2 Wils. 385, a distinction is taken between irregularity and error, in reference to judgments, and the court say: "Where a judgment is vacated for irregularity, the party is never excused if an execution is executed thereupon; yet the sheriff's officer is excused, because he has the king's writ to warrant him." And again they say: "In the case of an irregular judgment against the plaintiff, and a *capias satisfaciendum* executed thereupon, in trespass and imprisonment, the party and the officer joined in a plea of justification under the writ, and the officer was therefore held guilty, as well as the party; but where a judgment is reversed for error, it is different, and stands good until reversed. One case is the fault of the party himself, the other is the error of the court."

After an examination of the authorities referred to, and the cases of *Turner v. Walker*, 3 Gill & J. 385 [23 Am. Dec. 829];

Warfield v. Walter, 11 Id. 85, 86; and *Ranoul v. Griffie*, 3 Md. 59, 60, we do not think the plaintiff can maintain his suit. The facts set out in the replication do not necessarily present a case of want of jurisdiction by the magistrate; and a mere error of judgment on his part, if there was any, will not give the plaintiff a right of action. The judgment below upon the demurrer, in favor of the defendant, will therefore be affirmed.

Judgment affirmed.

JUDICIAL OFFICER IS NOT LIABLE for acts done by him while acting judicially and within the sphere of his jurisdiction: *Bailey v. Wiggins*, 60 Am. Dec. 650, note 654; *Borden v. State*, 54 Id. 217, note 243, where other cases are collected. But a magistrate of inferior jurisdiction, who acts in excess of or without jurisdiction, is liable in damages to a party injured by his acts: *Piper v. Pearson*, 61 Id. 438, note 441, where other cases are collected; especially where he exceeds his jurisdiction with knowledge of the facts constituting the excess: *Clarke v. May*, Id. 470, note 473; *Crumpton v. Neesman*, 46 Id. 251; *Miller v. Grice*, 44 Id. 271.

BUSBY v. CONOWAY.

[8 MARYLAND, 55.]

PLAINTIFF SUING ON PROMISE MADE IN CONSIDERATION OF FORBEARANCE TO FILE CAVEAT to a will must allege in his declaration that he was interested in setting the will aside.

DECLARATION IN ACTION BASED ON FORBEARANCE MUST SHOW EITHER DETERMINEMENT TO PLAINTIFF or a benefit to the defendant; and a declaration in an action on a promise made upon the consideration of forbearance to file a *caveat* to a will, which contains no allegation that the testator left any assets, either real or personal, after payment of his debts, is therefore fatally defective.

ASSUMPTION, brought by the appellant against the appellee, to recover a sum of money agreed to be paid by the defendant in consideration that the plaintiff would forbear contesting the will of Zachariah Conoway. The declaration alleged that the testator made a will by which, among other things, he bequeathed to the defendant property of the value of five thousand dollars; that plaintiff's wife was one of the heirs at law of the testator; that he had determined to contest the will, and to file a *caveat* thereto when it should be offered for probate, in the name of himself and wife, alleging that at the time of the making of the will the testator was not of sound mind, of which intention and determination the defendant had notice; that thereupon, in consideration that

the plaintiff would forbear and desist from contesting said will, the defendant undertook and promised to pay to the plaintiff the sum of two hundred dollars whenever he should be thereto required; that relying upon this promise, the plaintiff did forbear and desist from contesting the will, and filing a *caveat* thereto, but the defendant refused, upon request, to pay said sum of two hundred dollars. The defendant pleaded *non assumpsit*. The plaintiff proved that when the will of the testator was read in the presence of the defendant, the plaintiff, and his wife, she complained of the provisions of the will, and said it was not the will of the testator; that he had been unduly influenced by other persons to make it, and that there would be a lawsuit about it. He also proved that at the house of the plaintiff, about two years after the testator's death, plaintiff's wife asked the defendant whether he did not promise her on the evening after her father's burial that he would give her two hundred dollars if she would say no more about her father's will, to which he replied that he had told her that he would pay her that sum, but that he did not say when she would get it. The court, on the prayer of the defendant, instructed the jury that the plaintiff's declaration was radically defective and bad on general demurrer, there being no good and legal consideration to support the promise set out in it; and that the evidence was not sufficient in point of law to entitle the plaintiff to recover on the promise alleged in the declaration. The plaintiff excepted and appealed.

William P. Mawlsby, for the appellant.

Joseph M. Palmer, for the appellee.

By Court, EGGLESTON, J. The case of *Seaman v. Seaman*, 12 Wend. 381, is very similar to the present in several important particulars. There the *narr.* alleged that the father of the plaintiff and of the defendants left a will, in which he gave to the defendants and others a large amount of property, real and personal; that after death of the father, and before the will was proved, the plaintiff became dissatisfied with its provisions, and entertaining doubts in regard to the sanity of the testator at the time of the execution of the will, he filed a *caveat* against its being admitted to probate. That subsequently, in consideration that the plaintiff would withhold all opposition to the proving of the will, the defendants promised, in case the will should be proved and allowed, to pay to the plaintiff five hundred dollars. The plaintiff also averred that in consideration

of the promise of the defendants he promised to withhold all opposition to the probate of the will, and that he made no further opposition thereto, and that the will was thereupon duly proved and allowed, and letters testamentary were issued thereon to the defendants, who were named as executors in the will. Upon a demurrer to the *narr.*, judgment was given in favor of the defendants. And Justice Nelson, speaking for the court, says: "As, however, it does not sufficiently appear in the declaration that the plaintiff was particularly interested in setting aside the will of his father, and without this he could have no interest in contesting it before the surrogate, and of course lost nothing by the agreement, I think the demurrer well taken." In the particular which rendered that *narr.* defective, the one before us is certainly quite as defective.

In *Edwards v. Baugh*, 11 Mee. & W. 646, the allegation being that certain disputes and controversies were pending between the plaintiff and defendant, whether the defendant was indebted to the plaintiff in the sum of one hundred and seventy-three pounds two shillings three pence, and that in consideration of the plaintiff's promise not to sue, the defendant promised to pay him one hundred pounds, the *narr.* was held bad, as not showing a sufficient consideration, there being no allegation of any debt being due, but simply that a dispute and controversy existed respecting it. Lord Abinger thought there was nothing in the word "controversy" to render the alleged consideration a good one, and that the controversy merely was, that the plaintiff claimed the debt and the other denied it. See the cases referred to in the note on page 647; also *Jones v. Ashburnham*, 4 East, 455, 463; *Wade v. Simeon*, 2 Man. Gr. & S. 548; S. C., 52 Eng. Com. L. 546; 1 Parsons on Cont. 365-367.

In *Jones v. Ashburnham, supra*, the *narr.* was held bad because it did not show that at the time of the promise made by the defendant there was any administration upon the estate of the deceased original debtor, or that he left any assets. In regard to the rule that "any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking," etc., as laid down by Mr. Justice Yates in *Pillans v. Van Microp*, 3 Burr. 1673, when considering how that rule would apply to the case as stated by the *narr.* in *Jones v. Ashburnham, supra*, Lord Ellenborough says: "Now, how does the plaintiff show any damage to himself by forbearing to sue when there was no fund which could be the object of suit, where it does not appear that any person in *rerum natura* was liable to be sued by him? No right

can exist in this vague, abstract, and indefinite way." And again he says: "But here, whether there were any representative, or any funds of the original debtor, does not appear." Gross, J., also refers to the defect in the *narr.* for want of averring the existence of assets and an administration.

Rolfe, B., in *Edwards v. Baugh*, 11 Mee. & W. 646, denies the correctness of the proposition laid down by Mr. Henderson, in argument that forbearance would be a good consideration for a promise; so that if it had appeared on the face of the declaration that nothing was due to the plaintiff, his forbearance to sue would even then be a consideration. The baron says: "I cannot subscribe to that. I think the plaintiff is bound to show a consideration in the shape of something either beneficial to the opposite party or detrimental to himself."

The present *narr.* contains no allegation that Zachariah Conoway, the testator, left any assets, either real or personal, after payment of his debts. Nothing is said having the slightest relation to the subject of assets, except simply that by the will, amongst other things, the testator devised and bequeathed to the defendant "real and personal property and estate of a large value, to wit, of the value of five thousand dollars." The *narr.* therefore does not sufficiently show that the forbearance promised by the plaintiff was either a detriment to him or a benefit to the defendant, which we consider necessary in a suit based upon forbearance. The statement here made in reference to the gift of property by the will is very similar to that in *Seaman v. Seaman*, 12 Wend. 381, where the averment is that "the father of the plaintiff and of the defendants, in his life-time, made and published his last will and testament, whereby he devised and bequeathed to the defendants and others a large amount of property, real and personal."

There is no proof before us except what was given by the plaintiff. And although its truth, in every particular, be admitted, and the declaration be assumed to contain the statement of a sufficient consideration for the alleged promise of the defendant, nevertheless we do not think the proof sustains the contract as laid. An affirmance of the judgment must therefore follow.

Judgment affirmed.

FORBEARANCE TO CONTEST PROBATE OF WILL will not support promise to pay money, where no reasonable ground of contest exists: See *Prater v. Miller*, 60 Am. Dec. 521, note 524. An agreement not to oppose the probate of a will forms no consideration for a compromise, unless the party would be

in some way interested in the setting aside of the will: *Saxford v. Huxford*, 32 Mich. 318, citing the principal case. No recovery can be had upon a promise of forbearance made without consideration: *Ecker v. McAllister*, 45 Md. 306, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Baltimore C. P. R. Co. v. Wilkinson*, 30 Md. 230, to the point that it is always competent for a party, by a prayer properly framed, to call the court's attention to the pleadings, and to ask its judgment upon their sufficiency or legal effect. It is also distinguished in *Hartle v. Stahl*, 27 Id. 173.

MAYOR AND CITY COUNCIL OF BALTIMORE *v.* ROOT.

[8 MARYLAND, 95.]

FUNDS IN HANDS OF DISBURSING OFFICER OF MUNICIPAL CORPORATION, due to officers of the corporation for salaries, are not subject to attachment for debts owed by them.

MUNICIPAL CORPORATION IS PART OF STATE GOVERNMENT, exercising delegated political powers for public purposes, and the rule which prevents an attachment from being levied upon a claim of one state officer on funds in the hands of another applicable to its payment applies with equal force to the officers of such corporation.

MUNICIPAL CORPORATIONS ARE NOT INCLUDED IN PROVISIONS of the Maryland act of 1825, which authorizes an attachment to be levied upon property of the defendant in the hands of any "person or persons whatever, corporate or sole." Reason and necessity justify the construction of that statute which excepts such corporations from its operation.

IN CONSTRUING STATUTE, INTENTION OF MAKERS MUST BE REGARDED, and what is within that intention is within the statute, though not within the letter, while what is within the letter of the statute but not within the intention of the makers is not within the statute.

CREDITOR CANNOT ALWAYS ATTACH CLAIM BECAUSE CLAIMANT MAY SUE, although the general rule is that he can do so.

APPEAL from the superior court of Baltimore. The opinion states the facts.

Grafion L. Dulany and Benjamin C. Pressman, for the appellant.

T. Yates Walsh, for the appellee.

By Court, ECCLESTON, J. The present attachment was laid in the hands of J. J. Graves, the city register, who, at the time, as register, held money due by the mayor and city council of Baltimore to Brashears, the defendant, for his salary as a police officer. The judgment below sustained the attachment, and whether that decision is correct or not is the question for our consideration.

It has been repeatedly held that money due by the govern-

ment to its officers or agents for services rendered by them as such, whilst it remains in the hands of the government or in the keeping of its disbursing agents, is not liable to be attached or seized by the creditors of those having such claims upon the government. This is certainly true in regard to those who hold appointments directly from state authority. The opposite theory would be calculated to produce serious interruptions in the course of public business, and hinder and delay, if not entirely prevent, in some instances, the accomplishment of very important measures, depending for their successful termination upon the prompt and regular supply of the funds on which the officers or agents have to rely. Whilst treating of this subject in *Divine v. Harvie*, 7 T. B. Mon. 444 [18 Am. Dec. 194], the court say: "It would be a mortifying circumstance to see a member of the legislature rendered unable to pay his sustenance while attending on its session, because a creditor, who never dealt on the credit of the fund, should, by injunction, detain his compensation, on which he obtained credit with his host."

In *Chealy v. Brewer*, 7 Mass. 259, the treasurer of the county held twenty-one dollars and twenty-five cents, which was due to Brewer for services rendered by him as a juror. Under a statute of the state, the plaintiffs made an effort to have this money applied to the satisfaction of their claim against Brewer; insisting that the treasurer was to be considered as his trustee under the statute. But the court held that a public officer having money in hand to pay a demand which one has on him merely as a public officer cannot, for that cause, be adjudged his trustee. And the court say: "A contrary decision would be mischievous, as will appear from this single consideration, that it would suspend, during the pendency of an action, a possibility of settling the accounts of the officer who should be summoned as the trustee; and it may be added that it would unreasonably compel him to attend courts in every county in the commonwealth to answer interrogatories."

In *Bulkley v. Eckert*, 3 Pa. St. 368 [45 Am. Dec. 650], Bulkley had a judgment against Ulp and Eckert, on which an attachment issued. This writ was laid in the hands of J. Paul, who, being a school director of a township in the county, and treasurer of the board of school directors, had in his custody, as treasurer, the public money to be applied to the support of the schools in the township. Ulp, one of the defendants, had been a teacher in one of these schools, and for his services as such there was money due him, but neither of the defendants had

any other claim upon the garnishee. The decision in both courts was adverse to the claim of the attaching creditor, upon the ground that money in the hands of the treasurer, in his official character, could not be legally attached. The appellate court speak of his situation as being similar to that of a sheriff or prothonotary having money in his hands as a public officer, which has been determined not to be subject to the process of attachment. The injurious effects upon the regular arrangement and administration of public business by allowing such funds to be attached are well described by Mr. Justice Sergeant, who, in delivering the opinion of the court, says: "Great public inconvenience would ensue if money could be thus arrested in the hands of officers, and they be made liable to all the delay, embarrassment, and trouble that would ensue from being stopped in the routine of their business, compelled to appear in court, employ counsel, and answer interrogatories, as well as take care that the proceedings are regularly carried on, and bail to return duly given. If a precedent of this kind were set, there seems no reason why the state or county treasurer, or other fiscal officers of the commonwealth, or of municipal bodies, may not be subjected to the levying of attachments, which has never been attempted nor supposed to come within the attachment law. We do not therefore think this is such a debt as is contemplated by that law."

We do not understand the counsel for the appellee as contending that money due to a state officer for services, whilst it remains in the custody of a fiscal agent or officer of the state, can be attached. If the law will not permit it to be done in such a case, what good reason is there in support of such a principle which does not also apply with perfect propriety to county officers and those of municipal corporations? City charters are granted by the legislature for the purpose of carrying on the machinery of government within certain limits. And the power conferred in them to appoint fiscal agents and police officers, and to provide compensation for their services, are essentially necessary for carrying into effect the object and design of such charters as create corporate powers which are in reality but branches of the state government having delegated limited authority. Chancellor Kent says: "Public corporations are such as are created by the government for political purposes, as counties, cities, towns, and villages, and the whole interest in them belongs to the public;" 2 Kent's Com. 275. In the *Regents of the University of Maryland v. Williams*, 9 Gill &

J. 397 [31 Am. Dec. 72], the court say: "A public corporation is one that is created for political purposes, with political powers to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature and its members, officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns," etc. And again it is said: "The corporation of the university has none of the characteristics of a public corporation. It is not a municipal corporation. It was not created for political purposes, and is invested with no political powers. It is not an instrument of the government created for its own uses, nor are its members officers of the government, or subject to its control in the due management of its affairs."

As municipal corporations are parts of the state government exercising delegated political powers for public purposes, the rule which prevents an attachment from being levied upon a claim of one state officer on funds in the hands of another, applicable to its payment, must apply with equal force to a case like the present. If an argument against the right to attach, based upon inconvenience, can have an influence in any case, it surely should do so where the officers of a large city are necessarily very numerous.

The appellee's counsel, however, contends that the attachment is clearly authorized by the act of 1825, chapter 114, section 2, which provides for an attachment against the goods, chattels, and credits of a defendant in a judgment, "in the hands of the plaintiff, or in the hands of any other person or persons whatever, corporate or sole." This he thinks renders not only private corporations but those of a public municipal character also liable to such process. But we do not agree with him. There is no necessity to give such a construction for the purpose of giving effect to the law, as there are institutions on which it may operate without carrying it to the extent insisted upon by the appellee.

The argument from inconvenience, which, exclusive of the act, prohibits or denies the right of attachment, we think will sanction the construction that the legislature did not design to include municipal corporations. Although the language of the law of Kentucky, which was under consideration in *Divine v. Harvie*, 7 T. B. Mon. 444 [18 Am. Dec. 194], is very general and comprehensive, yet its general terms were not considered sufficient to entitle a creditor of an officer or employee of the state

to demand payment of his claim out of a sum of money allowed the employee in the ordinary appropriation bill. There the public inconvenience exerted considerable influence upon the decision.

In *Chealy v. Brewer*, 7 Mass. 259, the court were called on to construe a statute under which the plaintiffs sought to enforce the payment of their claim against Brewer by demanding payment of the county treasurer out of money in his hands due to Brewer as a juror. There the injury to the public arising from sustaining such a proceeding is referred to as worthy of much consideration by the court in giving an interpretation to the statute.

In Pennsylvania the law relative to domestic attachments, passed in 1807, by its second section provides that the officer to whom the process is directed "shall attach all the lands, goods, chattels, and effects of the defendants, in whose hands soever the same can be found." And the act passed in 1836, on the same subject, prescribes the form of the writ; in which command is given to the sheriff to attach all and singular the goods and chattels, lands and tenements, of the defendant, "in whose hands or possession soever the same may be." The fourth section then directs that the writ shall contain a clause requiring the officer "to summon the garnishee, or person in whose hands any of the defendant's money or other effects may happen to be." This language is certainly very general, and, looking at it in regard to its common import and meaning, would seem to authorize an attachment to be laid on the property and effects of a defendant in the hands of any person having the same, whether the parties, or either of them, were officers or not. And yet we find the courts deciding, in *Bulkley v. Eckert*, 3 Pa. St. 368, that the fiscal officers of the state or county, or of municipal bodies, are not subject to the levying of attachments, and have never been supposed to come within the attachment law. Now, if in that case the treasurer of the board of school directors of a township, having money in his custody to be applied to the support of the schools, is not, according to the proper construction of those laws, a person in whose hands any money or effects of the teacher are to be found, although for services rendered by the teacher there was money due him, and the necessity for guarding the public against the evils resulting from a different theory induced the construction given in that case, there is just as much propriety, from necessity, in the present instance, for holding that although the act of 1825

gives authority to levy an attachment in the hands of any person or persons, corporate or sole, nevertheless officers of a municipal corporation are not subject to the provisions of that act. The principle seems to be well settled, that without this act such officers would not be liable to process of this sort. That necessity which established this principle, and which likewise justified the Pennsylvania courts in so restricting the general language of their statutes as not to include even the treasurer of the board of school directors for a township, will not permit us so to construe our law as to sustain the plaintiff's claim. Reason and necessity, we think, fully justify the construction that the act does not include, but excepts, cases of this sort.

In Dwarris on Statutes, 728, in 9 Law Lib. 68, it is said: "In law all cases cannot be foreseen or expressed; the object of interpreting laws by what is called equity is to supply, as far as possible, this deficiency by recurrence to natural principles of justice. It is the same with cases excepted, by reason and necessity, out of the prescribed rules. As relates to this branch of interpretation last considered, when cases fall out which should not be determined by the literal rule, and therefore excepted out of it, the expressions of Grotius are strictly applicable: "*Fit autem, ea correctio, non tollendo legis obligationem, sed declarando legem in certo casu, non obligare.*" And in the case of the *State v. Boyd*, 2 Gill & J. 374, the court say: "Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter, on the principle that what is within the intention of the makers of a statute is within the statute, though not within the letter; and that what is within the letter of a statute but not within the intention of the makers is not within the statute; it being an acknowledged rule in the construction of statutes that the intention of the makers ought to be regarded."

In *Hawthorn v. St. Louis*, 11 Mo. 59 [47 Am. Dec. 141], it was decided that under the provisions of the statute of that state, to be found in the revised code of 1835, p. 254, a public municipal corporation could not be summoned as garnishee, on account of a sum due to an officer of the corporation as part of his salary, although it had been held that private corporations might be "proceeded against by garnishment." Hawthorn caused the city of St. Louis to be summoned as garnishee of Clark, who was recorder of the city, the plaintiff being an execution cred-

itor of Clark, to whom the city owed a balance on account of his salary. Because the city was "a public municipal corporation, created for the public benefit," the court held it not to be subject to the rules governing private corporations, such as banks, insurance companies, and other similar corporations. They then say: "It should not, therefore, be compelled to stand at the bar of all the courts in the state and participate in the judicial controversies carried on between debtors and creditors. Whilst these contests would be going on, the public interest would suffer, by abstracting from their corporate duties the time and attention of the officers and occupying them in contests about which the corporation had no interest. And however desirable it may be to creditors to enforce against the officers of the corporation their just demands by the means resorted to in this case, yet we think that public policy forbids the imposition of such a liability upon the corporation."

Neither in the Massachusetts nor the Pennsylvania case are the officers held to be excluded from the operation of their attachment laws, because those laws are considered as having reference to persons as individuals, and not to corporations. And in the Missouri decision the liability of private corporations is distinctly recognized. In all those cases we find the exemption of officers from attachments placed upon considerations of public policy, having in view the necessity of preventing serious impediments to the prompt and efficient discharge of official duties; just such considerations as should exclude the present parties from the operation of the act of 1825 by construing its language as not including corporations of a public municipal character.

The counsel for appellee says that under the city charter the defendant Brashears could have sued the corporation for his claim if his salary had been improperly withheld; and being a claim for which he had a right of action, it was a credit subject to attachment. Admitting, however, that Brashears might have maintained an action against the corporation, still the right of the appellee to attach the claim is not relieved from the objection to it, based upon considerations of public policy. Because a claimant may sue, it does not follow that his creditor can attach the claim in every case, although as a general rule it may be so. There is no intimation in the Pennsylvania case that the school-teacher could not have sued the treasurer of the board of school directors. And although in *Hawthorn v. St. Louis*, *supra*, the liability of the city to be summoned as garnishee was denied,

yet there can be no doubt that Clark, the recorder, had a right to sue the corporation for the amount of his salary then due. That this is true may be seen by reference to the decision in *Carr v. St. Louis*, 9 Mo. 190. There the plaintiff claimed fees due from the corporation to him, as recorder of the city; and his right to recover was sustained. See also article 1, section 2, of the amended charter of St. Louis, approved February 15, 1841, and article 1, section 2, of "an act to reduce the law incorporating the city of St. Louis, and the several acts amendatory thereof, into one act, and to amend the same," approved February 8, 1843.

Under the belief that the claim of Brashears was not liable to attachment, we must reverse the judgment below.

Judgment reversed and no *procedendo* ordered.

GARNISHMENT, LIABILITY OF MUNICIPAL CORPORATIONS TO: See note to *Divine v. Harvie*, 18 Am. Dec. 204, where this subject is discussed at length. A municipal corporation is not liable to the process of garnishment in favor of a creditor of one of its officers: *Hawthorn v. St. Louis*, 47 Id. 141; *Mervin v. City of Chicago*, 45 Ill. 136; *Wallace v. Lawyer*, 54 Ind. 508, both citing the principal case.

MUNICIPAL CORPORATION ENJOYS EXEMPTION OF GOVERNMENT in exercise of powers which it possesses for public purposes: *Stewart v. City of New Orleans*, 61 Am. Dec. 218, note 220, where other cases are collected.

DISTINCTION BETWEEN PUBLIC AND PRIVATE POWERS OF MUNICIPAL CORPORATION: See *Lloyd v. Mayor etc. of New York*, 55 Am. Dec. 347, note 349, where other cases are collected.

INTENTION OF LEGISLATURE IS TO GOVERN IN CONSTRUING STATUTES: See *Bellefonte & I. R. R. Co. v. Gregory*, 58 Am. Dec. 589, note 599, where other cases are collected. A statute will not be so construed as to work public mischief, unless required by clear unequivocal words: *People v. Lambier*, 47 Id. 273, note 279. Statutes should be construed according to the natural and obvious meaning and import of the terms, without resorting to any forced construction for the purpose of limiting or extending their operation: See note to *Waller v. Harris*, 32 Id. 597, and the cases there cited.

WHITE v. DAVIDSON.

[8 MARYLAND, 169.]

EMPLOYMENT OF ATTORNEY TO PROSECUTE INJUNCTION SUIT does not necessarily confer upon him authority to bind his client to indemnify a third person who becomes surety on the bond for the injunction.

WHETHER ISSUING OF INJUNCTION REQUIRES BOND OR NOT DEPENDS UPON DISCRETION of the judge who orders it.

PERSON FOR WHOM ANOTHER ASSUMES TO ACT AS AGENT WITHOUT AUTHORITY is not bound by the latter's acts, unless, on full knowledge, he afterwards recognizes and adopts them.

PARTNER WHO, WITHOUT AUTHORITY, AGREES TO INDEMNITY SECURITY on an injunction bond, given in a suit prosecuted for the benefit of his firm, does not thereby bind the firm unless his copartners subsequently ratify his act.

AGENCY DELEGATED TO THREE PERSONS, BY WRITTEN INSTRUMENT by which it is created and defined, cannot be executed by one of them.

AGENT CANNOT DELEGATE HIS AUTHORITY TO ANOTHER.

APPEAL from the superior court of Baltimore. The opinion states the case.

Robert J. Brent, for the appellant.

William A. Talbott and George W. Brown, for the appellees.

By Court, LE GRAND, C. J. The record in this case shows the following state of facts: A mercantile firm, under the style and name of Carter & Washington, in the city of Washington, District of Columbia, were indebted to merchants in the city of Baltimore. Washington, by transfer, as it was alleged, had conveyed the joint assets to secure the payment of his own debts to the exclusion of those of his partner, Carter. The creditors of both, in the city of Baltimore, being desirous of having the property appropriated to the payment of the debts of the firm, appointed a committee, in the following words, to superintend and guard their interests:

" We, the undersigned creditors of Carter & Washington, agree to contribute ratably our proportion of all expenses incurred (agreeably to the amount of our claims) in any legal or other proceedings which have or may be taken by A. B. Davidson, C. A. Hall, and T. W. Hall, in reference to the assignment and bill of sale made by R. C. Washington for the benefit of B. F. Gardner and Franklin Gardner; and we do hereby further agree to indemnify them against all loss for any liabilities assumed, or security given by them or by Henry Carter, of the late firm of Carter & Washington, in any further proceedings which may be taken by him or them, under the advice of their counsel, J. H. Bradley, esq., of Washington. Given under our hands this nineteenth day of June, 1846.

(Signed)

" HARRISON & Co.

" DAVIDSON & SANDERS.

" HALL, TAYLOR & Co.

" CAMPER & BRUFF.

" MARIOTT, MARYE & Co.

" H. W. HARRISON & Co.

" SPILKER & ALBERTI."

In pursuance of this authority, Sanders and Thomas W. Hall went to Washington, assuming to act on behalf of their own firms, and as representatives of the other creditors of Carter & Washington, to advise with counsel and take measures to oppose the deed of Washington. They employed Joseph H. Bradley, esq., as counsel, to file a bill for an injunction and to set aside the deed. Hall returned to Baltimore, leaving Sanders in Washington. Bradley procured the appellant to go on the injunction bond. The injunction was subsequently dissolved, suit instituted on the bond, and a judgment obtained against the appellant for upwards of three thousand dollars.

Mr. Bradley testifies that he requested the appellant White to go on the bond, but he positively refused to do so unless he had some written evidence of indemnity. Bradley then informed him that both Hall and Sanders had distinctly agreed that if such security could be got, the creditors whom they represented would indemnify the security; that on the same day, White being in the office of the witness, the latter then, in the presence and with the privity and consent of Sanders, wrote the following letter:

"**Mr. W. G. W. WHITE.**

"*Dear Sir—If the judge grants the injunction to-day, Mr. Carter will have to give security, of course. It is very important that none of the creditors should join in the bond, for I may want to make them, or some of them, witnesses. I have their authority for saying that if this thing is done they will release Carter and indemnify any one who goes his security. The penalty in the bond will probably be two thousand dollars, or possibly five thousand dollars, but the risk cannot be any more than the loss on the postponed sale of goods and the interest on their value and the expense of keeping them. Under these circumstances, I have suggested to Mr. Carter to ask you and Dr. Gunton, as the friend of Mr. Davidson, or some other gentleman here, to join him in the bond."*

In reply to certain interrogatories propounded to Thomas W. Hall and others on behalf of the appellant, he states, in substance, that he, in company with Mr. Davidson, visited Washington city, and there endeavored to get Carter to take legal measures to have set aside the deed of Washington, and as an inducement promised to procure a release from his firm and that of Davidson and Sanders, of all liability for what he was indebted to them. That Sanders, who was then the partner of Davidson, went to Washington, without any appointment from

the creditors of Carter & Washington constituting him their agent, for the purpose of taking the place of his partner, the said Davidson. He also denies that any arrangement in regard to the injunction or security obtained for it was assented to by him or his colleagues, Messrs. Davidson and Carter A. Hall, other than that of which the creditors were informed by Sanders, to wit, that Carter should file the bill and find the security, provided the creditors would release him unconditionally and pay the fee of Mr. Bradley.

The answer of Carter A. Hall, and that also of Alexander B. Davidson, explicitly denies the authority of Sanders to bind the creditors as he sought to do, according to the testimony of Bradley.

This statement of the facts is sufficiently full to present the questions of law arising out of the case.

The theory of the appellant's case is simply this: He claims to be indemnified for his loss because of the recovery had against him on his bond: 1. Because of a specific contract to that effect; and 2. That the employment of Bradley, as counsel, to file a bill for an injunction necessarily carried with it authority to do all things essential to its procurement, and if to such end a bond was indispensable, he had the right to promise an indemnity to any one who should become security on it, which would be binding on those whom he represented.

As to the first proposition, it involves a question of fact only, to wit, the existence of the contract. Bradley states that Thomas W. Hall and Sanders authorized it; Hall, on the other hand, denies it. From Sanders we have no response except that which is detailed in the answers of the two Halls and Davidson. Mr Bradley states that Thomas W. Hall, at an interview had between him, witness, and Sanders, "produced a paper and said they were authorized by the creditors who signed that paper to come to Washington and employ said Bradley to enjoin the sale which was advertised to take place." He did not, however, "read said paper or see the names signed to it." The only written authority to any one to superintend and manage the rights and interests of the Baltimore creditors, of which there is any evidence, is that bearing date the nineteenth day of June, 1846. This must have been the one produced by Thomas W. Hall, and had Mr. Bradley examined it, he would have seen it conferred no authority whatever on Mr. Sanders to employ counsel, or in any other manner to intermeddle with the business. Unless the parties sought to be held liable distinctly authorized him to

act, anything he might do would not bind them, unless, on full knowledge, they recognized and adopted his act. There is no proof whatever in the record that they have adopted the act of Bradley in writing to the appellant and promising him indemnity with the consent and privity of Sanders, as testified to by Bradley. So far from it, they expressly deny Sanders ever communicated to them any such promise as that spoken of by Mr. Bradley. In this state of case, if the defendants be responsible at all, it must be because the employment of Bradley as counsel conferred on him, as such, the right to bind them to hold any one who might be obtained as security on the injunction bond harmless from all loss which might result from the dissolution of the injunction, or because the action of Sanders and Hall, as testified to by Bradley, is binding on the firms of which they were partners. A consideration of these propositions necessarily assumes that the jury would believe the testimony of Mr. Bradley instead of that of Mr. Hall, which is in conflict with it.

Assuming, then, the facts to be as testified to by Mr. Bradley, we are of opinion that the defendants, either in whole or part, are not responsible to the appellant. The employment of counsel does not confer on him, *ex necessitate*, the right to bind his clients to indemnify a third party who may become security in the progress of the suit. The power of an attorney is very extensive, but it is not equivalent to that of his client. As such, it has been doubted, to say the least of it, by high authority, whether he may make a compromise, although he may submit a cause to arbitration: *Holker v. Parker*, 7 Cranch, 436. It is true, if the compromise be *bona fide* and work no considerable hardship, courts will be slow to disturb it, and they will refuse to do so when it has been acquiesced in with a full knowledge of the facts. In the case before us, there is no evidence the facts were ever communicated to the defendants; so far from it, those of them who have been examined expressly deny all knowledge of the agreement between Bradley and appellant, with sanction and privity of Sanders. It did not necessarily follow that the issuing of an injunction required a bond; that was a matter resting in the discretion of the judge who was to order it, and if he did require it, and security could not be obtained without an assurance of indemnity, the client should have been so notified.

We do not think the action of Hall and Sanders, as testified to by Bradley, binding on the firms of which they were members, unless they subsequently acquiesced in it. There is not

only no proof they ever did so, but on the contrary, the evidence is distinct and uncontradicted that they neither authorized nor subsequently ratified what was done by Mr. Bradley, in so far as his engagement with appellant is concerned.

The question involved in the case is not, strictly speaking, one of the authority of a partner to bind his copartners, but one of agency. Mr. Bradley was distinctly notified the agency had been created and defined by a written instrument. Had he consulted it, as perhaps it was his duty, he would have seen that the agency had been delegated to three persons, and not to one. A power to three cannot be executed by one of them; nor is there anything clearer or better established than that an agent cannot delegate his authority to another, the maxim being, *Delegatus non potest delegare*.

There is no necessity for our examining in detail the prayers, inasmuch as the views we have expressed plainly indicate our opinion to be that in the case made by the record the plaintiff cannot recover. We think, however, there can scarce be a doubt that on the facts contained in it an action could be maintained against Mr. Sanders and a recovery had against him.

Judgment affirmed.

ATTORNEY HAS NO AUTHORITY TO COMPROMISE his client's claim or suit: *De Louis v. Meek*, 50 Am. Dec. 491, note 510, where other cases are collected; *Fitch v. Scott*, 34 Id. 86. An attorney, as such, has no power to compromise claims of his client placed in his hands for collection by taking a bond or anything else except money, or by receiving less than is due: *Maddux v. Bevan*, 39 Md. 493, citing the principal case; *Barrow v. Farrow's Heirs*, 45 Am. Dec. 60; *Lockhart v. Wyatt*, 44 Id. 481, note 483; *Ball v. Bank of Alabama*, 42 Id. 649, note 656, where other cases are collected.

POWER OF ATTORNEY TO SUBMIT TO ARBITRATION: See *Jenkins v. Glessie*, 48 Am. Dec. 732, note 734; note to *Hutchins v. Johnson*, 30 Id. 628, where the subject is discussed at length.

RATIFICATION OF AGENT'S ACTS, EFFECT OF: *Persons v. McKibben*, 61 Am. Dec. 85, note 89, where other cases are collected; *McMahon v. McMahon*, 53 Id. 481, note 487; *Clealand v. Walker*, 46 Id. 238, note 242, where other cases are collected; *Planters' Bank v. Sharp*, 43 Id. 470, note 472.

AUTHORITY DELEGATED TO SEVERAL, HOW EXERCISED: See *Cushman v. Glover*, 52 Am. Dec. 461, note 463, where other cases are collected.

DELEGATED AUTHORITY CANNOT BE DELEGATED, WHEN: See *Lyons v. Jerome*, 37 Am. Dec. 271, and note 278, where other cases are collected.

HURST v. HILL.

[8 MARYLAND, 300.]

PARTNER CANNOT, BY NEW CONTRACT IN NAME OF FIRM, BIND HIS LATE PARTNER after the dissolution of the partnership, even when the consideration is a debt of the firm.

PARTNER CANNOT, AFTER DISSOLUTION, RENEW FIRM NOTE BY GIVING NEW NOTE in the name of the firm. The new note is a new contract, which cannot bind the other partner.

CREDITOR CANNOT SO DEAL WITH ONE OF HIS DEBTORS IN JOINT CONTRACT as to place the co-debtor in a position where it will be impossible for him to enforce contribution in case he pays the debt.

JUDGMENT FOR DEFENDANT ON PLEA OF NON ASSUMPSIT will not be reversed on appeal by the plaintiff for any error in an instruction in reference to the plea of limitations.

WHERE LIMITATIONS AND NON ASSUMPSIT ARE BOTH PLEADED, a prayer for instructions which overlooks the evidence offered under the plea of limitations and directs the jury to find for the plaintiff, notwithstanding they may find the debt barred by the statute, is fatally defective in not limiting the finding of the jury to the plea of *non assumpsit*.

Assumpsit on a promissory note of John R. Hill & Co., in favor of the plaintiffs, dated April 8, 1850, brought against the appellee Hill and one Gardner. Gardner suffered a judgment by default, and Hill pleaded *non assumpsit* and limitations. The plaintiffs proved that the defendants Hill and Gardner constituted the firm of John R. Hill & Co., which was dissolved about May, 1848; that the debt was originally contracted on partnership account; that the note in suit was given in 1850 in renewal of other notes previously given in the firm name; that the note was given by Gardner, and Hill was not present when it was given; and that after the dissolution Gardner had continued the business, and continued to deal with the plaintiffs. The defendant asked the court to instruct the jury that if they found from the evidence that the last note executed by Gardner was made by him in the name of the firm on the eighth day of April, 1850, then it is no such acknowledgment of indébtedness as will relieve this suit from the bar of the statute of limitations, upon the ground that the acknowledgment must be construed as being made on the eighth day of April, 1850, and the suit not being instituted until the thirtieth of July, 1853, more than three years had elapsed from the date of the acknowledgment, prior to the institution of the suit. The court gave this instruction, and the plaintiffs excepted. The defendant then offered evidence under the plea of *non assumpsit*, tending to prove his infancy during the partnership and after its dissolution. The plaintiffs then asked

the following instruction: If the jury find that the note sued on was given by Gardner; that Gardner with the defendant Hill formed the partnership of John R. Hill & Co.; that the consideration of the note was a debt due from said partnership for goods furnished during its continuance, and in renewal of a previous note for the same debt of the sixth of May, 1848—then the plaintiffs are entitled to recover, although they find that during the existence of said partnership the said Hill was an infant, unless they further find that within a reasonable time after he arrived at age he gave notice of the disaffirmance of said debt. The court refused to give this instruction, and the jury found for the defendant on both issues.

B. T. B. Worthington and F. H. Stockett, for the appellants

A. B. Hagner and A. Randall, for the appellee.

By Court, TUCK, J. The point to be considered on the defendant's prayer is, whether, upon the proof stated, he was liable on the note made by Gardner, in the name of the firm, on the eighth of April, 1850, after the partnership had been dissolved.

Upon the propriety of this instruction we entertain no doubt. The decided cases show very clearly that one partner cannot, by a new contract in the name of the firm, bind his late partner, even when the consideration is a debt of the firm. In *Ellicot v. Nichols*, 7 Gill, 100 [48 Am. Dec. 546], the court of appeals said: "The doctrine is fundamental, that from the moment a partnership terminates the partners become distinct persons with respect to each other, and that consequently one partner can have no power to subject, by his acts or declarations, his former associate to new obligations, burdens, or responsibilities;" and in 3 Kent's Com. 62: "One partner cannot impose new obligations on the firm, nor vary the form or character of those already existing." The same doctrine was announced in *Bell v. Morrison*, 1 Pet. 351. Conceding that he may acknowledge a debt of the partnership after the dissolution and thereby continue the liability of the other partners, where the cause of action is not barred by the statute of limitations at the time of the acknowledgment, it is certain that the claim can be enforced only in the form in which the debt stood at the dissolution: Carey on Part., 187, 188; Collyer on Part., secs. 540, 541; Story on Part., secs. 322-324. He cannot change the form of the indebtedness by giving a new note in the name of the firm: *Perrin v. Keene*, 19 Me. 355 [36 Am. Dec. 759]; *National Bank v. Norton*, 1 Hill (N. Y.), 572.

That the note now sued is a new contract is very plain. The note held by the plaintiffs when the firm was dissolved was past due when the present one was given by Gardner to them. By it the time was extended without the consent of Hill, which not only prevented him from paying the debt, if he had sought to do so, before the expiration of the time limited in the note for payment, unless the plaintiffs had chosen to receive payment in advance; but if he had paid, he could not have enforced his claim for contribution against Gardner until after the day of payment. A creditor cannot so deal with one of his debtors in a joint contract as to place the co-debtor in such a predicament.

In either aspect of the question, the appellant must fail. If reliance be placed on the note as giving a new cause of action, as of the time limited for its payment, the answer is that Gardner had no authority under the law to bind Hill by this new contract. And if they accepted the note as an acknowledgment of the original debt, they must be bound by the application of the statute at the expiration of three years from its date, for it certainly cannot operate with any greater effect as against this appellee; and according to this view, it is conceded that the plaintiffs' suit was barred.

Independently of these views, the judgment could not be reversed on this instruction, because, according to the record, the plaintiffs failed upon the issue on the plea of *non assumpsit*: *Cross v. Hall*, 4 Md. 426.

What has been said in reference to the defendant's prayer must dispose of the ruling of the court on that offered by the plaintiffs. If, as we have shown, the defendant was not liable on the note at all, for want of authority in Gardner to make it, it is immaterial whether he disaffirmed this debt or not after his arrival at age. Besides, the prayer is fatal to itself in overlooking the evidence offered under the plea of limitations. According to the instruction as prayed, the jury might have found for the plaintiffs, notwithstanding they might have been satisfied of the truth of the facts set up as a bar under the statute. The prayer is too general in not limiting the finding of the jury upon the hypothesis there stated to the plea of *non assumpsit*.

Judgment affirmed.

POWER OF PARTNER AFTER DISSOLUTION: See *Van Keuren v. Parmele*, 51 Am. Dec. 322, note 330, where this subject is discussed at some length. A partner cannot, after dissolution, subject, by his acts or declarations, his former associate to new obligations, burdens, or responsibilities: *Rhodes v.*

Amstelock, 28 Md. 254, citing the principal case. A partner cannot, after dissolution, give a note in the firm name without some special authority: *Woodworth v. Downer*, 37 Am. Dec. 611, note 612, where other cases are collected. A partner, after dissolution, has no power to bind the firm by renewing a note: *Galliot v. Planters' and Mechanics' Bank*, 36 Id. 256. Nor can a partner authorized to settle and adjust the copartnership affairs make new contracts or create new liabilities, as by giving promissory notes binding on the firm: *Perrin v. Keene*, Id. 759, note 760, where other cases are collected. Nor can a partner, after dissolution, bind the firm by an acknowledgment of a debt: *Muse v. Donelson*, Id. 309.

CONTRIBUTION BETWEEN JOINT OBLIGORS: See *Fates v. Donaldson*, 61 Am. Dec. 283, note 294; *Mills v. Hyde*, 46 Id. 177; *Pearce v. Breed*, 34 Id. 178, note 181, where other cases are collected.

ANDERSON v. TYDINGS.

[8 MARYLAND, 457.]

DEBTOR MAY GIVE PREFERENCE TO ONE CREDITOR OVER ANOTHER, if the instrument intended to effect that object contains the requisite provisions. But if, by mistake of law, the parties adopt such an instrument as cannot effect their intention without the aid of a court of equity, the court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of a debtor in very embarrassed circumstances.

COURT OF EQUITY WILL NOT DEPRIVE CREDITORS OF LEGAL ADVANTAGE which they have by reason of a mistake of law in the drawing of a deed, by reforming such deed for the benefit of parties who have no stronger equity than they.

EQUITY IS WILLING TO GIVE IMMEDIATE PARTIES TO INSTRUMENT PRIVILEGE OR CORRECTING its errors arising from mistake when the controversy is between themselves, but is averse to permitting such corrections when the rights of strangers are involved.

DISCLAIMER OF INTEREST IN LAND, MADE BY PARTY AFTER JUDGMENTS have been rendered against him, does not destroy the liens of such judgments upon the legal right which he had in the land at the time when the judgments were rendered.

MARYLAND ACT OF 1841, CHAPTER 161, DOES NOT DEPRIVE HUSBAND OR LIFE ESTATE in his wife's lands, but merely prohibits the sale of the property under judgments during her life-time, leaving the judgment liens upon his estate subject to stay of execution until the death of the wife.

JUDGMENT, WITH STAY OF EXECUTION UNTIL HAPPENING OF CONTINGENCY, or until a future specified time, is a lien upon the real estate of the defendant during the stay.

LIEN OF JUDGMENT IS NOT LOST OR SUSPENDED even during continuance of an injunction, although the injunction stops the execution.

APPEAL from the equity side of the circuit court for Anne Arundel county. The bill was filed by the appellees, the chil-

dren and heirs at law of Mary Ann Tydings, for an injunction to restrain an execution levied by the appellants, who were judgment creditors of Roger Tydings, the husband of said Mary A. Tydings, deceased, upon said Roger Tydings' interest as tenant by the courtesy in certain land conveyed to her in fee, and to correct an alleged mistake in the deed. The court decreed a conveyance of the legal interest of Roger Tydings under the deed to his children, and granted a perpetual injunction against the other defendants. The defendants appealed. The other facts are stated in the opinion.

H. M. Murray and F. H. Stockett, for the appellants.

Cornelius McLean, for the appellees.

By Court, EGGLESTON, J. Some time prior to the year 1848, Roger Tydings, one of the defendants, purchased and paid for the property now in controversy, but never received a deed for the same from the vendor, Thomas R. Beard. But on the eighth of January, 1848, Beard and wife, by a deed of bargain and sale, for the consideration of one hundred and forty-four dollars, as therein stated, conveyed the property to Mary R. Tydings (the wife of R. Tydings), her heirs and assigns, in fee-simple. Subsequently the defendants Anderson and Hall, and Davidson, filed a bill in equity for the purpose of vacating the deed as fraudulent and void. During the pendency of that suit Mary Ann Tydings died. The chancellor did not think the deed void for fraud, and concluded his opinion in the following language: "The deed, therefore, in my opinion, must be permitted to stand; and as the complainants can reach Roger Tydings's interest as tenant by the courtesy by an execution at law (if he is entitled to such interest), this court should not interfere and grant relief to that extent. The bill, therefore, will be dismissed." After that decision the appellants issued executions upon their judgments against R. Tydings, and caused them to be levied upon the disputed property, upon the ground that he had a life estate therein, as tenant by the courtesy. For the purpose of enjoining those executions, and also of reforming the deed to Mrs. Tydings, so as to make it consistent with the real intention of the parties, the present bill was filed. It alleges that R. Tydings was much embarrassed, and owned, amongst other debts, one of about five hundred dollars to John F. Nicholson, his brother-in-law, who was pressing him for its payment; that Nicholson owed about the same amount to his mother, Mrs. Elliott, who was also the mother of Mrs. Tydings; that Nichol-

son was willing to pay his mother by applying his claim against R. Tydings for that purpose, and it was finally agreed that Mrs. Elliott should take, in full payment of her claim against her son, the property purchased by R. Tydings from Beard, which arrangement was to be in satisfaction of the debt due to Nicholson by R. Tydings. The bill also alleges that Mrs. Elliott agreed, in this mode, to purchase the property for the benefit of her daughter, Mrs. Tydings, and her children, "or for her benefit, so that it should not be in any way subject to the debts" of her husband, and that he should have no interest therein; that it was the design of Mrs. Elliott, Nicholson, and R. Tydings that the latter should have no interest in the property; and when he, R. Tydings, gave directions for drawing the deed, he told the conveyancer it was to be for the benefit of his wife, Mrs. Tydings, but through the unskillfulness of the conveyancer and the ignorance of the parties as to the proper plan of conveying the property to Mrs. Tydings so as to prevent her husband from having any legal interest therein, instead of such a deed as would have carried into effect the intention of the parties, the one prepared was that which appears to have been executed on the eighth of January, 1848, by Thomas R. Beard to Mary Ann Tydings.

Under the sale from Beard to Tydings, the latter, having paid the purchase money and obtained possession, had a full equitable title to the property, the former holding nothing but the dry legal title, which he conveyed to Mrs. Tydings with the consent and authority of her husband. As we understand the allegations in the bill, R. Tydings was induced to unite in the arrangement which resulted in the conveyance to his wife, in consideration of that arrangement being a payment in full of his debt to Nicholson. The chancellor speaks of this transaction in the former case, 3 Md. Ch. Dec. 167, as giving preference of one creditor over others. Under some circumstances, a debtor may do that, provided the instrument designed to effect the object contains the requisite provisions. But if, in consequence of a mistake in law, the parties select and make use of such an instrument as cannot effect their intention without the aid of a court of equity, the court will not correct the mistake by reforming the instrument to the prejudice of the general creditors of a debtor in very embarrassed circumstances.

In *Hunt v. Rousmaniere*, 1 Pet. 1, the object which the parties had in view is clearly shown; and it is equally evident they supposed the instrument made use of would as effectually ac-

complish their object as a mortgage could. The intention being clearly established, it was insisted that as the failure to carry it into effect resulted from a mistake in regard to the proper means of doing so, the complainant might claim the aid of a court of equity to place him in the same condition he would have been if the appropriate instrument had been used. But the court refused the relief asked for, and conclude their opinion by saying: "If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff would, we think, be sufficient to induce the court to leave the parties where the law has placed them."

That was the case of a mistake in law. And here, after stating the arrangement, the bill alleges that the deed was prepared and executed in its present form "through the unskillfulness of the conveyancer, and the ignorance of all the parties as to the proper plan of conveying the property to Mary A. Tydings, so as to prevent R. Tydings from having any legal interest therein." This averment, in connection with the evidence given by the witnesses of the complainants, shows that if any mistake occurred in regard to the present deed, it was a mistake in law, and one which, perhaps, would never have been thought of but for the decease of Mrs. Tydings, leaving her husband the survivor.

Supposing the arrangement now before us was clear of fraud, if the deed had given Mrs. Tydings the property for her sole and separate use, she might have held it free from any right of the defendants, claiming under their judgments obtained since the deed; but as that instrument gave her a common fee-simple estate, which at her decease left in her surviving husband a life estate as tenant by the courtesy, and therefore liable to execution, the question is, whether a court of equity will reform the deed because of the alleged mistake, and exclude the judgment creditors by injunction.

Admitting that, as between the complainants and their father, the deed would be reformed on account of the mistake, it is by no means a necessary consequence that it should be reformed in prejudice of the creditors, whose judgments are based on claims existing prior to the deed.

By agreement, the proceedings in the former suit in equity are made evidence in this. There it will be seen the chancellor sustained the validity of the deed against the allegation of fraud, chiefly, if not exclusively, upon the ground that by means of the deed the debt due from Tydings to Nicholson was satisfied,

and that the former had a legal right to give the latter a preference over the complainants in that suit, who are defendants and the judgment creditors in this. In this view of the subject, it is evident those defendants stand upon quite as equitable ground as the parties claiming under the deed, or under the arrangement which caused the deed. The object of the parties to that arrangement no doubt was, by a legal conveyance to shut out the claims of the creditors of R. Tydings, and if such a conveyance as could have produced that effect had been executed, the legal advantage obtained thereby would have been made use of. But inasmuch as, by a mistake in law, and the subsequent death of Mrs. Tydings, the legal advantage is given to the creditors, a court of equity will not deprive them of that advantage for the benefit of those whose claim rests upon no stronger equity than theirs.

In *Hunt v. Rousmaniere*, 1 Pet. 1, whilst the supreme court do not say there are no cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law, they seem very plainly to maintain that, as a general rule, equity will not relieve in such cases. And speaking in reference to the particular case before them, they say: "If the court would not interfere in such a case generally, much less would it do so in favor of one creditor against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself." In the case before us, the parties do not stand upon equal ground at law, but the creditors have the advantage at law, with equal equity, and seeking no relief from a court of equity, they only ask to be permitted to exercise their legal rights.

In an action of *assumpsit*, *Henderson v. Mayhew*, 2 Gill, 409 [41 Am. Dec. 434], the court say: "Parol evidence is inadmissible to change or contradict the terms of a written instrument. Strangers to the instrument, when authorized to impeach or contradict it, may offer parol testimony for that purpose; and so a grantor may in a controversy with the grantee, if he charges the same to have been obtained by fraud or mistake. But the parties to a written instrument are not permitted, in controversies with strangers, to insist that it does not express what it was intended to express. The appellants, after obtaining an absolute deed and authorizing the community to regard them as the owners of the vessel, cannot now, for their own benefit, be permitted to allege that their bill of sale is a mortgage."

And the court also say: "The party here, who is a stranger to the deed, insists that it is what it purports to be, and the appellants who accepted it are precluded from offering the evidence on which they rely in order to defeat the action against them."

This case shows a willingness to afford the immediate parties to an instrument the privilege of correcting its errors arising from mistake when the controversy is between themselves, but much aversion to permitting such corrections when the rights of strangers are involved. But without resorting to this decision at law as an authority in the present case in equity, we think the principles established by the supreme court in the chancery suit of *Hunt v. Rousmaniere*, 1 Pet. 1, are sufficient to show that the complainants are not entitled to the relief they seek against the defendants, who are creditors of R. Tydings.

The counsel for the appellees says, that in the former suit R. Tydings, in his answer, disclaimed any interest in the property in question; and that such disclaimer, in a court of equity, will exclude the creditors from any right to claim through him the payment of their judgments, or to levy executions upon the property after the decease of Mrs. Tydings. But if, under different circumstances, the disclaimer could have the effect ascribed to it, yet, as the judgments bear date prior to the disclaimer, they were liens upon the legal right, which, by the character of the deed, was vested in R. Tydings, and no subsequent act of his could destroy those liens.

Although it should be admitted that the act of 1841, chapter 161, prohibited the sale of the property under the judgments during the life of the wife, that act still left in the husband the same life estate which he would have had prior to the passage of the law, upon which estate the judgments were liens, subject to stay of execution until the death of the wife. A judgment with a stay of execution, according to express terms, until the happening of a contingency, or until a future specified time, notwithstanding the stay, is a lien upon the real estate of the defendant during the stay. An injunction stops an execution, but the lien of the judgment is not lost or suspended even during the continuance of the injunction: *Murphy v. Cord*, 12 Gill & J. 182.

Entertaining the views expressed in this opinion, we will reverse the decree below, for the purpose of dissolving the injunction, with costs to the creditor defendants, and dismiss the bill, but without prejudice to the rights of the complainants in refer-

ence to any interest or right which R. Tydings may have in the property in contest, or the proceeds thereof, after the judgments are satisfied; and a decree for such purposes will be signed.

Decree reversed.

DEBTOR MAY GIVE PREFERENCE TO ONE CREDITOR OVER ANOTHER: See *Kuykendall v. McDonald*, 57 Am. Dec. 212, note 217; *Milburn v. Beach*, 55 Id. 91, note 97; *Kimball v. Thompson*, 50 Id. 799, note 804; *Arthur v. Commercial etc. Bank*, 48 Id. 719, note 724, where other cases are collected.

MISTAKE OF LAW, WHEN EQUITY WILL RELIEVE ON GROUND OF: See *Dell v. Shahan*, 60 Am. Dec. 540, note 543; *Leinenendorfer v. Delphy*, 55 Id. 137, note 141; *Stone v. Hale*, 52 Id. 185; *Leavitt v. Palmer*, 51 Id. 333, note 344, where other cases are collected; *Juzan v. Toulmin*, 44 Id. 448; *Tyson v. Pasemore*, Id. 181; *Good v. Herr*, 42 Id. 236, note 239.

WHEN EQUITY RELIEVES AGAINST FRAUD, MISTAKE, OR SURPRISE: See *McElderry v. Shipley*, 56 Am. Dec. 703, note 706, where other cases are collected.

AGREEMENT MADE UNDER MISTAKE OF LAW, EFFECT OF: See *State v. Reigart*, 39 Am. Dec. 628, note 639, where other cases are collected.

LIEN OF JUDGMENT, HOW AFFECTED BY INJUNCTION AGAINST EXECUTION: See *Bartlett v. Doe*, 41 Am. Dec. 52; *Mitchell v. Anderson*, 26 Id. 158; *Conway v. Jett*, 24 Id. 590; *Lynn v. Gridley*, 12 Id. 591, note 595.

LIEN OF JUDGMENT HOW AFFECTED BY SUSPENSION OF EXECUTION: See *Pickett v. Doe*, 43 Am. Dec. 523, note 527, where other cases are collected.

LIEN OF JUDGMENT, PENDING WRIT OF ERROR: See *Planters' Bank v. Calvit*, 41 Am. Dec. 616, note 625, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Hoffman v. Rice*, 38 Md. 285, to the point that the act of 1841, chapter 161, did not destroy tenancies by the curtesy, nor liens of judgments on such interests. It suspended the right of execution during the life of the wife, but left the judgment lien perfect on the life estate of the husband, to be enforced on her death; and in *Oscould v. Hoover*, 43 Id. 371, to the point that the relation of debtor and creditor may exist between husband and wife in equity.

CITIZENS BANK OF BALTIMORE v. HOWELL.

[8 MARYLAND, 590.]

PROTESTS OF INLAND BILLS AND PROMISSORY NOTES ARE MADE PRIMA FACIE EVIDENCE by the Maryland act of 1837, chapter 253, and it is the duty of banks receiving such instruments for collection to place them in the hands of a notary, that they may be protested in due time, when necessary.

BANK IS NOT ANSWERABLE FOR LOSS RESULTING FROM FAILURE OF NOTARY to perform his duty, where it receives for collection a note or bill, in the ordinary course of business, without any special agreement on the subject, and in due time delivers it to the notary usually employed by it in such matters, so that the necessary demand, protest, and notices may be made and given.

ASSUMPTION by the appellees against the appellant to recover the amount of a promissory note drawn by Wesley F. Walter in favor of Edmond T. H. Walter, the payee, who indorsed it to the plaintiffs, who deposited it with the defendant for collection. The declaration alleged that the amount of this note was lost to the plaintiffs by the neglect of the notary public employed by the bank, in not properly notifying the indorser of the dishonor of the note. Plea, *non assumpsit*. There was a verdict and judgment for the plaintiffs, and the defendant appealed. The other facts appear from the opinion.

D. C. H. Emory and T. S. Alexander, for the appellant.

C. W. Ridgely and St. G. W. Teackle, for the appellees.

By Court, ECCLESTON, J. The counsel for the appellant insist that the record presents for our consideration, not only the inquiry whether the court was right in the instructions given to the jury, but also whether there was not error in refusing to grant the prayers of the appellant; whilst the appellees contend that no exception was taken to the rejection of the prayers, but only to the instructions by the court. We are inclined to think the latter is the correct view; but the point need not be decided, because, confining ourselves to the instructions, we find such error in them as to require a reversal of the judgment.

The following is the language of the court: "If the jury believe from the evidence in the cause that the note offered in evidence was drawn by Wesley F. Walter and indorsed by Edmond T. H. Walter, and that the said indorser and drawer both resided in the city of Baltimore at the time of maturity, and that the note was held by the bank at said time, in said city, for collection on account of the plaintiffs, and shall believe they were then, and still are, the owners of the same; and if they shall further believe that the said note was not paid at maturity, and that said indorser had no notice of the non-payment thereof on the day of its maturity or the next day thereafter, and that no notice thereof was left by the plaintiffs or their agent at the residence or place of business of said indorser—then the indorser is not responsible for the payment of said note by reason of his indorsement, although they should believe that the plaintiffs, or their agent duly authorized thereto, as well as other persons in the city of Baltimore, misdirected the notary as to the actual residence of the said indorser, unless they should believe that upon proper and reasonable diligence it was not in the power

of the notary to have procured better and correct information as to the residence or place of business of the said indorser.

"If the jury believe the facts stated above as to said note, that the contract and undertaking of the bank with the plaintiffs is to be found by the jury from all the evidence in the cause; and if they shall find from such evidence that the bank undertook, on receiving this note for collection, only to employ a competent and proper person to demand payment of said note at maturity, and give the proper notices of its non-payment, and that they did employ such competent and proper person, and placed the note in his hands in time to have said demand made on the day of the maturity of the note, and such notices given—then the bank is not responsible, although they should believe that by the negligence or other fault of such person so employed the note has become lost to the said plaintiffs. But if the jury should believe, from the evidence in the cause, that the undertaking of the bank, in their receiving said note for collection, was that they would do all that was proper and necessary to be done by the plaintiffs themselves, in order to the security of the interests of the plaintiffs, so far forth as the responsibility of the drawer and indorser was concerned, then the defendant is answerable to the plaintiffs for whatever loss they may find the plaintiffs to have incurred by reason of such negligence and insufficient action of the bank or the person employed by it, as aforesaid."

In the latter part of the opinion and direction thus given by the court, the jury are told, if they believe from the evidence that in receiving the note for collection the bank undertook to do all that was proper and necessary to be done by the plaintiffs themselves in order to secure the interests of the plaintiffs so far as the responsibility of the drawer and indorser was concerned, then the bank is answerable to the plaintiffs for any loss they had incurred by reason of negligence and insufficient action of the bank or the person employed by it. "The person employed," here spoken of, means, of course, the notary. But we see no evidence tending to prove any undertaking or agreement whatever, on the part of the bank, which can render it responsible to the plaintiffs for the alleged negligence of the notary, or for his insufficient action in the premises, and for want of proof to sustain such responsibility, we think there was error in giving the instruction.

The act of 1837, chapter 253, makes protests of inland bills of exchange and promissory notes *prima facie* evidence; and for

the purpose of securing the benefit of this law to the owners of such instruments, it is the duty of the banks receiving them for collection to place them in the hands of a notary, that they may be protested in due time, when necessary. And we think that in this state, when, in the ordinary course of business, without any special agreement on the subject, a note or bill is received by a bank for collection, which is in due time delivered by it to the notary usually employed in such matters by the bank, so that the necessary demand, protest, and notices may be made and given by him, the bank will not be answerable in case of loss resulting from a failure of the notary to perform his duty.

The responsibility of banks receiving notes for collection, where they have employed other banks or agents, has been carried further in New York than in some other states of the Union. But even there, in *Smedes v. Utica Bank*, 20 Johns. 384, where the bank was held answerable on account of having employed a person to make demand and give the notice who was not a competent agent, the court say: "If the note had been delivered to a notary, it would present a different case. Notaries are officers appointed by the state; confidence is placed in them by the government. This may be evidence sufficient to justify an agent in committing to them business relating to their offices, although, in point of fact, it might subsequently appear they did not possess the necessary qualifications." See also Story on Agency, sec. 201; *Pawson v. Donnell*, 1 Gill & J. 147 [19 Am. Dec. 213]; *Jackson v. Union Bank*, 6 Har. & J. 150; *Fabens v. Mercantile Bank*, 23 Pick. 330 [34 Am. Dec. 59]; *Dorchester Bank v. New England Bank*, 1 Cush. 177, 188; *East Haddam Bank v. Soovill*, 12 Conn. 303; *Bellemeire v. Bank of United States*, 4 Whart. 105, and 1 Miles, 173 [33 Am. Dec. 46]; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 18 [45 Am. Dec. 72]; *Hyde & Goodrich v. Planters' Bank of Miss.*, 17 La. 560 [36 Am. Dec. 621]; *Tiernan v. Commercial Bank of Natchez*, 7 How. (Miss.) 648 [40 Am. Dec. 83]; *Angell & Ames on Corp.* 186.

Judgment reversed and *procedendo* ordered.

NOTARIAL PROTESTS, EFFECT OF, AS EVIDENCE: See *Schneider v. Cochrane*, 61 Am. Dec. 204; *Dupie v. Richard*, 43 Id. 216, note, where the subject of protests is discussed at length.

BANK FOR COLLECTION IS NOT LIABLE FOR FAILURE OF NOTARY to give notice of protest: See *Baldwin v. Bank of Louisiana*, 45 Am. Dec. 72, note 76, where other cases are collected; *Hyde v. Planters' Bank*, 36 Id. 621; *Allen v. Merchants' Bank of New York*, 34 Id. 289, note 313, where this question is discussed at length; *Bellemeire v. Bank of United States*, 33 Id. 46, note 50.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

SARGENT v. ADAMS.

[8 GRAY, 72.]

PARTY SEEKING TO RECOVER ON BREACH OF CONTRACT containing mutual and dependent covenants must aver and prove his own offer and readiness to perform, and that the other party has failed to perform on his part.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN LATENT AMBIGUITIES in written agreement to lease for a term of years the "Adams house, situate on Washington street, in Boston," so as to show that the intention of parties was to include only that part of the building fitted up as a hotel under the name of the "Adams house," and not the separate shops below, which occupied all the ground floor except the part used as an entrance to the hotel.

MONEY PAID UNDER AGREEMENT FOR LEASE CANNOT BE RECOVERED BACK on the ground of breach of the agreement, because the lease offered contained covenants on the part of the lessee to cleanse the drains and vaults, and not to assign nor underlet, nor make alterations without the consent of the lessor, if at the time of such offer the lessee failed to specify his objections to the lease, though requested to do so by the lessor.

ASSUMPSIT for money had and received. A hotel under the name of the Adams house had been fitted up by defendant. Beneath it he had built five stores, which occupied the whole of the ground-floor, with the exception of the entry to the house, which was No. 371. Each of the stores was occupied as such, except the one numbered 3, which was vacant. Subsequent to the fitting up of such house, mutual bonds were entered into between the plaintiff and defendant, whereby defendant covenanted and agreed with plaintiff to lease to him "for a term of ten years the 'Adams house,' so called, situate on Washington street, in Boston, and numbered 371 on said Washington

street," for an annual rent, and also to sell and deliver to said plaintiff a "good and perfect bill of sale of all furniture in said Adams house for a certain sum, to be secured by mortgage upon said furniture," and to execute and deliver the necessary papers on the twenty-second of February. Plaintiff on his part covenanted and agreed to pay the rent and purchase the furniture as agreed upon, and to deliver all the necessary papers by said date. Plaintiff on the twenty-third of February paid the sum of one thousand one hundred dollars in part performance of the agreement, in consideration of which the time of performance was extended to the first of March. Such sum paid is the money sought to be recovered in this action. Oral evidence was offered to show that the parties originally agreed by parol to let and hire the house exclusive of said stores, and that afterwards, before the execution of the bonds, it was agreed by parol that store No. 3 should be included at an additional rent, that it might be used by the lessees for a ladies' entrance. On the date agreed defendant executed and tendered to plaintiff the lease of the building "now kept as a hotel, and known as the 'Adams house,' together with the store under said hotel, numbered 3," for the agreed time at the stipulated rent, and also tendered a bill of sale of the furniture as agreed upon. The plaintiff declined to accept them, on the ground that they were not in accordance with the bonds, but did not say the papers were wrong, nor did he offer any specific objections to them. The remaining facts are stated in the opinion.

T. Willey and D. H. Mason, for the plaintiff.

R. Choate and C. C. Nutter, for the defendant.

By Court, SHAW, C. J. The questions in this case arise upon the construction of the bond from Adams to Sargent and Moulton, and the refusal or failure of Adams to perform it on his part, so as to entitle Sargent to recover back the advance, as money paid on a consideration which had failed.

This is plainly one of that class of cases in which the contracts of each party, being mutual and dependent, are to be performed simultaneously. Neither is bound to perform on his part unless the other is ready at the same time to perform on his part. The party who would seek to recover of the other upon a breach of contract or failure to perform must aver and prove his own offer and readiness to perform, and that the other party has failed to perform on his part. Both parties, apparently aware of this rule, met on the first of March, the extended

time for mutual performance. The defendant produced a lease, already signed and sealed, and which had previously been exhibited to the plaintiff for inspection; and also a bill of sale of the furniture, to which no objection seems to have been made; and offered to deliver them to the plaintiff, on receiving the money and securities to be paid and delivered to him at the same time by the plaintiff.

It is very manifest from the description in the lease offered that it did not include but one of the stores in the Adams house, under the part used for a hotel; and the first question is, whether the obligation to let the Adams house at a specified rent did include the five stores. If it did, the lease excluding four of those stores, being an important and valuable part of the whole estate, could not be a substantial performance of a contract to let the whole at the same rent.

What was embraced in the bond by the description "Adams house"? It is not therein described as a hotel. The parties are indeed described as innholders, but this, being a mere description of the persons, affords no light. It is built on the site of the old Lamb tavern, but that leads to no definite conclusion that it was itself a tavern. Looking at the mere contract itself, it might have been free from all ambiguity; because, in applying the description, it must have appeared that there was an estate definitely described, and as well known by that name as the Old State House or the Boylston Market house. It is purely matter of description, and must be established by evidence *aliunde*. But the facts detailed in this statement do show that there is an estate corresponding in part to the description, to wit, a house known as the Adams house, in Washington street, certain parts of which had been previously, and up to the time, and at the time of the contract, used and occupied as a hotel; and certain other parts of it used and occupied for shops for the sale of goods, let to separate tenants with no interior communication, nor any other connection with the residue as a hotel than that of relative position, being supported by the same foundation, and sheltered by the same roof. But this is common, especially in cities, with entirely distinct tenements or holdings. This description, therefore, so brief in its terms, when applied to the estate in question, leaves it in doubt whether these stores are excluded or included in the term "Adams house." But yet this is the whole of the description used in the bond, expressive of the subject-matter of the lease.

It is argued on the part of the plaintiff that "house" means

the whole of a house, and not part of a house; that it includes all upon the same foundation, and covered by the same roof. This would be quite plausible, indeed an argument of considerable weight, if the term was used in its generic sense, as "my house situated in" such a town, or such a street. But it is plainly used as a proper name, or specific designation; and taken in connection with the fact that hotels are so named, it leaves it still doubtful. If it had been a stipulation to convey in fee instead of to lease, it would carry a much stronger conviction that it intended the soil, *usque ad cælum*. But as a hotel may be complete in all its parts without including separate tenements under it, and is often designated by the term "house"—as the Tremont house, the Winthrop house, and the like—and as it looked simply to a term of years with the furniture of the hotel, it leaves the matter questionable. In ascertaining what is parcel, what are the monuments, bounds, abutments, names of streets, or places, it is always competent, and indeed often necessary, to go into parol evidence, or evidence *aliunde*. A very palpable instance arises in this very description, short as it is. The estate is described as situated on Washington street. Should a modern conveyancer be tracing back this title, he would find an estate apparently the same in other respects, but described as standing on Newbury street. He must seek abroad for evidence, which he would soon find, that not many years since the name of Newbury street was changed to Washington street.

In seeking for all surrounding circumstances to throw light on matter of description, the object is to obtain from the words used in the instrument, in the light of all such circumstances, the intent and meaning of the parties. In doing this, it is an established rule that if some of the circumstances do not correspond with a probable exposition they will not prevent its adoption, if from the whole description the meaning or intent of the contractor or devisor can be collected, under the maxim, *Falsa demonstratio non nocet*. But in coming to apply the description to the contract, and after all these means of exposition have been exhausted, there may remain an uncertainty in such application; this constitutes a latent ambiguity; and then the law is well settled that parol evidence is admissible to explain what was intended.

And upon consideration of the evidence, the court are of opinion that this constituted a case of latent ambiguity, as that is understood and explained in this department of the law. The

brief description "the Adams house" created no ambiguity on the face of the deed; it was to be presumed that there was a house or estate well known to which it would apply, and there was no ambiguity in the language of the contract. One party intended to let and the other intended to hire a tenement so named and so known. But when this designation came to be applied to the subject, there were two subjects to which, without any forced construction, it might apply, to wit, the site or soil on which the Lamb tavern formerly stood, and the house built upon it; or it might apply to a tenement consisting of suites of apartments other than the stores, which together made a complete hotel. It was a lease for years; and such a tenement might be composed of parts of a building divided horizontally, as well as by metes and bounds on the surface; though were it a deed in fee, it would be construed otherwise. The stores being numbered 1, 2, 3, 4, and 5 Adams house, would simply show that they were parts of the building; but their being wholly detached without any interior communication, and built, as the case finds, under the Adams house, would lead to a contrary conclusion. For this reason we are of opinion that this was a latent ambiguity; and within the rule, parol evidence was admissible to explain it: 3 Stark. Ev. 1026. It falls under that class of cases where the very general description adopted in a contract will apply to two distinct subjects, and so there is a latent ambiguity. In the case of *Doe v. Burt*, 1 T. R. 701, the question was what passed by the terms of a lease where it was contended upon the maxim, *Cujus est solum ejus est ad celum et ad inferos*, that a cellar under a portion of the leased premises should pass. Evidence *aliunde* was admitted. Mr. Justice Grose said, by way of illustration: "It might as well be contended that a lease of a house in the Adelphi would pass the warehouses underneath."

The parol evidence being admitted, the case is put beyond all doubt by proof that the contract did not include the five stores in the lower story of the hotel. The mere designation "Adams house" would not include either one of the stores, but the lease, as actually drawn up and offered by Adams, did include store No. 3. The reason of this is explained by resorting to the parol proof; but independently of this, the including of this store No. 3 in the leased premises, at the rate of rent stipulated by the contract for the hotel only, could not be objected to by the lessees, being manifestly for their benefit.

The court are of opinion, therefore, that so far as the objec-

tion to the sufficiency of the lease offered by the defendant was founded on the consideration that it did not embrace the stores under the Adams house, it was not well founded, and that the lease in this respect conformed to the contract.

We have already stated that this was a case where the parties were to perform simultaneously, and where each must prove readiness and preparation on his part before he can charge the other with default. Under this rule, it might be a question, as here were mutual agreements to enter into a lease by indenture to become binding on both parties, whose particular duty it was to prepare these indentures; and where one offered a draft for consideration, which the other declined accepting, whether the party objecting should not have offered a draft on his part, for the consideration of the other side, which he would be willing to execute. But perhaps this is a mere abstract question. The plaintiff might, no doubt, have tendered such a draft, whether he was bound to do it or not. It was his duty to do enough to show his present readiness to perform. The demise of the premises and the sale of the furniture on the one side, and the payment of the stipulated portion of the purchase money and a mortgage on the furniture for the balance on the other, were parts of one entire contract, so that one was not to be done without the other. Without stopping to inquire whether in strictness the plaintiff should have counted out or produced money enough to pay the required sum, he must at least show a default on the part of the defendant. Tried by this test, it appears that the defendant did, in the first instance, prepare and offer an executed lease demising the premises agreed for, for the term stipulated, at the rent agreed, together with a bill of sale of the furniture, to which there was not then and has not since been made any objection.

The plaintiff now makes other objections to the lease offered, because it contained covenants on the part of the lessees not to assign or underlet during the term, to make no alterations on the premises without the written assent of the lessor, and to scour and cleanse the drains on the premises; and contends that the lessees were not bound to execute these covenants, because they were burdensome and imposed an unusual restraint on their rights as lessees, and were not stipulated for by the contract. If the case depended upon the question whether the lessees were bound by the terms or fair implication of the contract to take a lease with these restrictions, it might require further consideration, and it might be necessary to determine whether they were

not bound to execute a lease with reasonable and usual covenants, and whether these were usual and reasonable.

But the court are of opinion that it is a sufficient answer that these objections were not made at the time when the terms of the indenture might have been amended and modified so as to obviate these objections. Adams having produced a draft of lease on his part, which was a substantial performance, if the other parties had objections to the form of the instrument they should have made specific objections at the time. But it appears by the evidence that neither these specific objections nor any others were made at the time. Upon repeated inquiries by Adams what the objections of the lessees were, no specific objection was made, but only that it was not according to the bond. It is no sufficient answer to say that at one time Adams said: "This lease is according to the bond; I have taken advice upon it, and will give you no other;" because the defendant afterwards left the room, and after a short time returned with his counsel, tendered the bill of sale, the plaintiff read the papers, upon which the defendant asked him if they were right, and frequently requested him to say whether they were wrong, and said if they were not right he would make them so. And to these requests the plaintiff made no satisfactory reply, and made no objection to the papers.

For these reasons, and without deciding whether the plaintiff has proved his own readiness and ability to perform on his part, by payment of the sum stipulated, the court are of opinion that he has not shown a default on the part of the defendant which would warrant him in rescinding the contract, and which would be a failure of consideration, enabling him to recover back the money advanced, as upon a consideration which had failed.

Judgment for the defendant.

ACTION IN CASE OF MUTUAL AND DEPENDENT COVENANTS cannot be maintained for failure of one of the parties unless the party complaining aver and prove an offer, and readiness to perform on his part: See *Shinn v. Roberts*, 43 Am. Dec. 636, and cases cited in note 643.

EXTRINSIC EVIDENCE, WHEN ADMISSIBLE TO EXPLAIN LATENT AMBIGUITY: See *Baldwin v. Carter*, 42 Am. Dec. 735, and note 739; *Herson v. Henderson*, 53 Id. 187, note; *Marshall v. Haney*, 59 Id. 92. To this point the principal case is cited in *Gerrish v. Towne*, 3 Gray, 88; *Indiana Central Canal Co. v. State*, 53 Ind. 591; *Woods v. Sawin*, 4 Gray, 323; *Paige v. Sherman*, 6 Id. 514; *Stoops v. Smith*, 100 Mass. 66; *Chester Emery Co. v. Lucas*, 112 Id. 435, to the effect that parol evidence is admissible to apply the terms of a contract to the subject-matter, to explain names of localities used, apply descriptions, boundaries, and the like. In *Boardman v. Lake Shore & M. S. Ry Co.*, 84 N. Y. 173, the principal case is cited to the effect that parol evidence is not admissible to explain uncertainty in the wording of a contract.

BRATTLE SQUARE CHURCH v. GRANT.

[3 GRAY, 142.]

LIMITATION BY WAY OF EXECUTORY DEVISE, which may possibly not take effect within the term of a life or lives in being at the death of the testator and twenty-one years, or in case of a child *en ventre sa mere* twenty-one years and nine months, afterward, is void as being too remote, and tending to create a perpetuity.

DEVISE WHICH IS SUBJECT TO CONDITIONAL LIMITATION, VOID FOR REMOTENESS, vests in the first taker an absolute estate.

INTENT OF TESTATOR WILL GENERALLY CONTROL IN CONSTRUCTION OF DEVISE, but where such intent cannot be given force without a violation of the rules of law, it will fail of effect.

DEVISE OF HOUSE AND LAND TO DEACONS OF CHURCH AND THEIR SUCCESSORS FOREVER, on condition that the minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church, and in case the same is not improved for that use only, then the bequest to be void and of no force, and said house and land to then revert to the nephew of testatrix, is a conditional limitation to the nephew, and not a devise upon condition, and as such is void for being too remote, and an absolute estate in fee vests in the deacons and their successors.

BILL in equity by plaintiffs for leave to sell the parsonage house held by the deacons of the Brattle Square church, under a devise to them and their successors forever. The devise was made by testatrix upon an express condition, as follows, viz.: "The minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church, and in case the same is not improved for that use only, I then declare the bequest to be void, and of no force, and order that said house and land shall revert to my estate, and I give the same to my nephew John Hancock and his heirs forever." Said Hancock was by such will made residuary devisee. The bill showed that said elder minister had dwelt in said church constantly since the decease of the testatrix, but that the expense for taxes and for keeping the same in repair would require large sums of money, and that a sale was necessary to a beneficial accomplishment of the intent of the devise. The heirs of John Hancock answered, claiming that under such will the deacons held a conditional estate, and on failure to comply with the condition thereof, the heirs would be entitled to the estate, and that such a decree and sale would be against equity. The remaining facts are stated in the opinion.

C. B. Goodrich and I. J. Austin, for the plaintiffs.

C. L. Hancock, for the defendant, Hancock.

By Court, BIGELOW, J. The interesting and important questions involved in the present case are now for the first time brought to our consideration. In a suit in equity between the same parties, which was pending several years ago in this court, we were not called upon to give any construction to the clause in the will of Lydia Hancock under which the deacons of the church in Brattle square and their successors hold the estate now in controversy. The object of that suit was widely different from that of the present. The plaintiffs then assumed by implication that they were bound by the "condition and limitation" annexed to the devise, and the validity of the gift over on breach of the condition was not called in question by them. The single purpose then sought to be accomplished was to obtain authority to sell the estate solely on the ground that from various causes the occupation and use of the premises for a private dwelling, and especially for a parsonage, in the manner prescribed in the will, had become onerous and impracticable; and the prayer of the bill was, that if a sale was authorized the proceeds might be invested in other real estate, to be held on the same trusts, and upon the like condition and limitation, as are set out and prescribed in the will of the testatrix relative to the estate therein devised to the deacons and their successors. It is quite obvious that on a bill thus framed no question could arise concerning the respective titles of the parties to the suit under the devise. They were not put in issue by the pleadings, and no decision was in fact made in regard to them. That suit was determined solely upon the ground that the case made by the plaintiffs was not such as to warrant the court in making a decree for a sale of the premises upon the reasons and for the causes alleged in that bill, and above stated.

The case is now brought before us upon allegations and denials which directly involve the construction of the devise and render it necessary to determine the respective rights of the devisees and heirs at law to the estate in controversy. In order to decide the questions thus raised, it is material to ascertain, in the outset, the legal nature and quality of the estate which is created by the terms of the devise to Timothy Newell and others, deacons of the church in Brattle street. If the gift had been solely to the deacons of the church in Brattle street, and their successors forever, without any condition annexed thereto concerning its use and occupation, it would without doubt have vested in them the absolute legal estate in fee. By the provincial statute of 28 Geo. II., which was in force at the time of the death of the

testatrix, the deacons of all Protestant churches were made bodies corporate, with power to take in succession all grants and donations, both of real and personal estate: Anc. Chart. 605. The words of the devise were apt and sufficient to create a fee in the deacons and their successors, and they were legally competent to take and hold such an estate. It therefore becomes necessary to consider the nature and effect of the condition annexed to the gift, how far it qualifies the fee devised to the deacons and their successors, and what was the interest or estate devised over to John Hancock and his heirs forever upon a failure to comply with and perform the condition. It will aid in the solution of these questions if we are able in the first place to determine with clearness and accuracy within what class or division of conditional and contingent estates the devise in question falls.

Strictly speaking, and using words in their precise legal import, the devise in question does not create simply an estate on condition. By the common law, a condition annexed to real estate could be reserved only to the grantor, or devisor, and his heirs. Upon a breach of the condition, the estate of the grantee or devisee was not *ipso facto* terminated, but the law permitted it to continue beyond the time when the contingency upon which it was given or granted happened, and until an entry or claim was made by the grantor or his heirs or the heirs of the devisor, who alone had the right to take advantage of a breach: 2 Bla. Com. 156; 4 Kent's Com., 6th ed., 122, 127. Hence arose the distinction between a condition and a conditional limitation. A condition followed by a limitation over to a third person, in case the condition be not fulfilled, or there be a breach of it, is termed a conditional limitation. A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. If it were otherwise, it would be in the power of the heir to defeat the limitation over by neglecting or refusing to enter for breach of the condition. This distinction was originally introduced in the case of wills to get rid of the embarrassment arising from the rule of the ancient common law, that an estate could not be limited to a stranger upon an event which went to abridge or destroy an estate previously limited. A conditional limitation

is therefore of a mixed nature, partaking both of a condition and of a limitation: of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim.

There is a further distinction in the nature of estates on condition and those created by conditional limitation, which it may be material to notice. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or devisor. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno statu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or devisor or his heirs. The right or possibility of reverter, which, on the creation of an estate in fee on condition merely, would remain in him is given over by the limitation which is to take effect on the breach of the condition.

One material difference, therefore, between an estate in fee on condition and on a conditional limitation is briefly this: that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs; while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person upon a contingency, at a future and uncertain period of time. A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against

perpetuities in the same degree with other conditional and contingent interests in real estate of an executory character. The possibility of reverter, being a vested interest in real property, is capable at all times of being released to the person holding the estate on condition, or his grantee, and if so released vests an absolute and indefeasible title thereto. The grant or devise of a fee on condition does not therefore fetter and tie up estates, so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property. It is otherwise with gifts or grants of estates in fee with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all, and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect.

Bearing in mind these distinctions, it is obvious that the devise in question was not the gift of an estate on a condition merely, but it also created a limitation over, on the happening of the prescribed contingency, to a third person and his heirs forever. It was therefore a conditional limitation, under which general head or division may be comprehended every limitation which is to vest an interest in a third person on condition, or upon an event which may or may not happen. Such limitations include certain estates in remainder, as well as gifts and grants, which, when made by will, are termed executory devises, and when contained in conveyances to uses, assume the name of springing or shifting uses: 1 Preston on Estates, secs. 40, 41, 93; 4 Kent's Com., 6th ed., 128, note; 2 Fearne on Cont. Rem., 10th ed., 50; 1 Powell on Devises, 192, and note 4; 1 Shep. Touch. 126.

That the devise in question does not create a contingent remainder in John Hancock and his heirs is very clear, upon familiar and well-established principles. There is, in the first place, no particular estate, upon the natural determination of which the limitation over is to take effect. The essence of a remainder is that it is to arise immediately on the determination of the particular estate by lapse of time, or other determinate event, and not in abridgment of it. Thus a devise to A. for twenty

years, remainder to B. in fee, is the most simple illustration of a particular estate and a remainder. The limitation over does not arise and take effect until the expiration of the period of twenty years, when the particular estate comes to an end by its own limitation. So a gift to A. until C. returns from Rome, and then to B. in fee, constitutes a valid remainder, because the particular estate, not being a fee, is made to determine upon a fixed and definite event, upon the happening of which it comes to its natural termination. But if a gift be to A. and his heirs till C. returns from Rome, then to B. in fee, the limitation over is not good as a remainder, because the precedent estate, being an estate in fee, is abridged and brought to an abrupt termination by the gift over on the prescribed contingency. One of the tests, therefore, by which to distinguish between estates in remainder and other contingent and conditional interests in real property is, that where the event which gives birth to the ultimate limitation determines and breaks off the preceding estate before its natural termination, or operates to abridge it, the limitation over does not create a remainder, because it does not wait for the regular expiration of the preceding estate: 1 Jarm. on Wills, 780; 4 Kent's Com. 197. Besides, wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified and determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility, or right of reverter, which does not constitute an actual estate: 4 Kent's Com. 10, note; *Martin v. Strachan*, 5 T. R. 107, note; 1 Jarm. on Wills, 792. All the estate vests in the first grantee, notwithstanding the qualification annexed to it. If, therefore, the prior gift or grant be of a fee, there can be neither particular estate nor remainder; there is no particular estate which is an estate less than a fee; and no remainder, because the fee being exhausted by the prior gift, there is nothing left of it to constitute a remainder. Until the happening of the contingency, or a breach of the condition by which the precedent estate is determined, it retains all the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee. The prior estate may continue forever, it being an estate of inheritance, and liable only to determine on an event which may never happen. For this reason, the rule of the common law was established, that a remainder could not be limited after a fee. In the present case, the devise was, as we have already stated, a gift to the deacons and their successors forever; and they being, by statute, a quasi

corporation empowered to take and hold grants in fee, it vested in them, *ex vi termini*, an estate in fee, qualified and determinable by a failure to comply with the prescribed condition. The limitation over, therefore, to John Hancock and his heirs could not take effect as a remainder.

It necessarily results from these views of the nature and quality of conditional and contingent estates, as applicable to the devise in question, that the limitation of the estate over to John Hancock and his heirs, after the devise in fee to the deacons and their successors, is a conditional limitation, and must take effect, if at all, as an executory devise. The original purpose of executory devises was to carry into effect the will of the testator, and give effect to limitations over, which could not operate as contingent remainders by the rules of the common law. Indeed, the general and comprehensive definition of an executory devise is, a limitation by will of a future estate or interest in land which cannot, consistently with the rules of law, take effect as a remainder. Every devise to a person in derogation of or substitution for a preceding estate in fee-simple is an executory devise: 4 Kent's Com. 264; 1 Jarm. on Wills, 778; Lewis on Perp. 72; 6 Cru. Dig., tit. 38, c. 17, secs. 1, 2; *Purefoy v. Rogers*, 2 Saund. 388 a, and note. Thus a limitation to A. and his heirs, and if he die under the age of twenty-one years then to B. and his heirs, is an executory devise, because it is a limitation of an estate over after an estate in fee. This, by the rules of the ancient common law, would have been void, for the reason that they did not permit any limitation over after the grant of a previous fee. Whenever, therefore, a devisor disposes of the whole fee in an estate to one person, but qualifies this disposition by giving the estate over, upon breach of a condition or happening of a contingency, to some other person, this creates an executory devise: 4 Kent's Com. 268; 6 Cru. Dig., tit. 38, c. 17, sec. 2; Bac. Abr., tit. Devise, 1; 1 Fearne on Cont. Rem. 399.

In the case at bar, the devise is to the deacons and their successors in this office forever. By itself, this gave to them an absolute estate in fee-simple, but the gift in fee was qualified and abridged by the condition annexed and by the limitation over to John Hancock and his heirs. From the rules and principles which we have been considering, it would seem to be very clear that the devise in question did not create an estate on condition, because the entire fee passed out of the devisor by the will; no right of entry for breach of the condition was

reserved, either directly or by implication to herself or her heirs, but upon the prescribed contingency it was devised over to a third person in fee. It did not create an estate in remainder, because there was no particular estate which was first to be determined by its own limitation before the gift over took effect, and because, the prior gift being of the entire fee, there was no remainder, inasmuch as the prior estate might continue forever. It did create an executory devise, because it was a limitation by will of a fee after a fee, which by the rules of law could not take effect as a remainder.

This being the nature of the devise to John Hancock and his heirs, it remains to be considered whether there is anything in the nature of the gift over which renders it invalid, and if so, the effect of its invalidity upon the prior estate devised to the deacons and their successors. Upon the first branch of this inquiry, the only question raised is, whether the gift over is not made to take effect upon a contingency which is too remote, as violating the well-established and salutary rule against perpetuities. Executory devises in their nature tend to perpetuities, because they render the estate unalienable during the period allowed for the contingenciey to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery, or otherwise: 4 Kent's Com. 266; *Purefoy v. Rogers*, 2 Saund. 388 a, note; Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has therefore long been the settled rule in England, and adopted as part of the common law of this commonwealth, that all limitations by way of executory devise which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterwards, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void, as too remote, and tending to create perpetuities: 4 Kent's Com. 267; 1 Jarm. on Wills, 221; 4 Cru. Dig., tit. 32, c. 24, sec. 18; *Nightingale v. Burrell*, 15 Pick. 111; see also *Cadell v. Palmer*, 1 Cl. & Fin. 372, 421, 423, which contains a very full and elaborate history and discussion of the cases on this subject. In the application of this rule, in order to test the legality of a limitation, it is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of

the prescribed period, the limitation is void. The object of the rule is to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect. If the event upon which the limitation over is to take effect may, by possibility, not occur within the allowed period, the executory devise is too remote, and cannot take effect: *Nightingale v. Burrell, supra*; 4 Kent's Com. 283; 6 Cru. Dig., tit. 38, c. 17, sec. 23. These rules are stated with great precision in 2 Atkinson on Conveyancing, 2d ed., 264.

The devise over to the heirs of John Hancock is therefore void, as being too remote. The event upon which the prior estate was to determine, and the gift over take effect, might or might not occur within a life or lives in being at the death of the testatrix, and twenty-one years thereafter. The minister of the church in Brattle square, it is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred or a thousand years to come. The limitation over is not made to take effect on an event which necessarily must happen at any fixed period of time, or even at all. It is not dependent on any act or omission of the devisees over which they might exercise a control. It is strictly a collateral limitation, to arise at a near or remote period, uncertain and indeterminate and contingent upon the will of a person who may at any time happen to be clothed with the office of eldest minister of the church in Brattle square. It is difficult to imagine an event more indefinite as to the time at which it may happen, or more uncertain as to the cause to which it is to owe its birth.

The more common cases of limitations by executory devise, which are held void as contravening the rule against perpetuities, are when property is given over upon an indefinite failure of issue, or to a class of persons answering a particular description, or specifically named; as to the children of A. who shall attain the age of twenty-five, or to a person possessing a certain qualification, with which he will not be necessarily clothed within the prescribed period. So gifts to take effect upon the extinction of a dignity, by failure of the lives of persons to whom it is descendible: *Bacon v. Proctor*, Turn. & R. 31; *Mackworth v. Hinckman*, 2 Keen, 658; or depending on the contingency of no heir male, or other heir, of a particular person

attaining twenty-one, no person being named as answering that description: *Ker v. Lord Dungannon*, 1 Dr. & War. 509, are held invalid, as being too remote. So, too, in a case more analogous to the present, where the testator devised lands to trustees, and directed the yearly rents to a certain amount then fixed and named in the will, to be appropriated for certain charitable purposes; and provided that, in the event of there being a new letting, by which an increase of rents was obtained, the surplus arising from such increase should go to the use and behoof of the person or persons belonging to certain families, who for the time being should be lord or lords, lady or ladies, of the manor of Downpatrick; and in case the said families did not protect the charities established by the will, or if the said families should become extinct, then the said surplus rents were to be appropriated to said charities, in addition to the former provisions for the charity; it was held that the gift over of the surplus rents to the trustees for the charity was too remote, as the contingency upon which it was to take effect was not restricted to the proper limits: *Commissioners of Charitable Donations v. Baroness De Clifford*, 1 Dr. & War. 245, 253. In this case, Lord Chancellor Sugden says: "This is a clear, equitable devise of a fee qualified or limited; a fee in the surplus rents for this family, so long as they shall be lords and ladies of the manor of Downpatrick, 'in case' (and I must here read the words 'in case' as if they were 'whilst,' or 'so long as') certain persons protect the almshouse, etc.; and thus the limitation would assume the same character as that which is so familiar to us all, viz., while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over, dependent on such an estate; a limitation after it is void, and cannot be supported; otherwise it would take effect after the time allowed by law." It is difficult to distinguish that case from the one at bar. The contingency of the families neglecting to protect the charities established by the will in that case was no more remote than that of the failure or omission of the minister of the church for the time being to reside and dwell in the house, as is prescribed by the will in the present case. Either event might take place within the prescribed period, but it might not until a long time afterwards. It can make no difference in the application of the case cited that it was the gift of an equitable fee-simple, because the limits prescribed to the creation of

future estates and interests are the same at law and in equity: Lewis on Perp. 169; 4 Cru. Dig., tit. 32, c. 24, sec. 1; *Duke of Norfolk v. Howard*, 1 Vern. 164.

But it is quite unnecessary to seek out analogies to sustain this point, as we have a direct and decisive authority in the case of *Welsh v. Foster*, 12 Mass. 77. It was there held that a limitation in substance the same as that annexed to the devise in the present case, being made to take effect when the estate should cease to be used for a particular purpose, was void, for the reason that it contravened the rule against perpetuities. That was the case of a grant by deed, with a proviso that the estate was not to vest "until the mill-pond [on the premises] should cease to be employed for the purpose of carrying any two mill-wheels;" and it was adjudged that the rule was the same as to springing and shifting uses created by deed as that uniformly applied to executory devises in order to prevent the creation of inalienable estates. The limitation was therefore held invalid, as depending on a contingency too remote.

The true test by which to ascertain whether a limitation over is void for remoteness is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question, whether the prescribed contingency or event may not arise until after the time allowed by law within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote.

The remaining inquiry is as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift in fee to the deacons and their successors forever. Upon this point, we understand the rule to be that if a limitation over is void by reason of its remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee, or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such cases is, that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised: if for life,

then it takes effect as a life estate; if in fee, then as a fee-simple absolute: 1 Jarm. on Wills, 200, 783; Lewis on Perp. 657; 2 Bla. Com. 156; 4 Kent's Com. 130; Co. Lit. 206 a, 206 b, 223 a. The reason on which this rule is said to rest is, that when a party has granted or devised an estate, he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations. Thus it has been often held that when land is devised to A. in fee, and upon the failure of issue of A. then to B. in fee, and the first estate is so limited that it cannot take effect as an estate-tail in A., the limitation over to B. is void as being too remote, because given upon an indefinite failure of issue, and the estate vests absolutely in fee in A., discharged of the limitation over. So it was early held that where a testator devised all his real and personal estate to his wife for life, and after her death to his son and his heirs forever, and in case of the death of the son without any heir then over to the plaintiff in fee, the devise over to the plaintiff was void, and the son took an absolute estate in fee: *Tisbury v. Barbut*, 3 Atk. 617; *Tyle v. Willis*, Cas. temp. Talb. 1; 1 Fearne on Cont. Rem. 445. So, too, if a devise be made to A. and his heirs forever, and for want of such heirs then to a stranger in fee, the devise over to the stranger would be void for remoteness, and A. would take a fee-simple absolute: *Nottingham v. Jennings*, 1 P. Wms. 25; 1 Powell on Devises, 178, 179; *Purefoy v. Rogers*, 2 Saund. 388 a, b; 1 Fearne on Cont. Rem. 467; *Attorney General v. Gill*, 2 P. Wms. 369; *Busby v. Salter*, 2 Pres. Abs. 164; *Kampf v. Jones*, 2 Keen, 756; *Ring v. Hardwick*, 2 Beav. 352; *Miller v. McComb*, 26 Wend. 229; *Ferris v. Gibeon*, 4 Edw. Ch. 707; *Taylor v. Tator*, 4 Barb. 431; *Conklin v. Conklin*, 3 Sandf. Ch. 64.

Such, indeed, is the necessary result which follows from the manner in which executory devises came into being and were ingrafted on the stock of the common law. Originally, as has been already stated, no estate could be limited over after a limitation in fee-simple, and in such case the estate became absolute in the first taker. This rule was afterwards relaxed in cases of devises for the purpose of effectuating the intent of testators, so far as to render such gifts valid by way of executory devise, when confined within the limits prescribed to guard against perpetuities. If a testator violated the rule by a limitation over which was too remote, the result was the same as if at common law he had attempted to create a remainder after an estate in fee. The remainder would have been void, and the fee-simple

absolute would have vested in the first taker: 6 Cru. Dig., tit. 38, c. 12, sec. 20; Co. Lit., 18 a, 271 b.

The rule is, therefore, that no estate can be devised to take effect in remainder after an estate in fee-simple; but a devise, to vest in derogation of an estate in fee previously devised, may, under proper limits, be good by way of executory devise. If, after a limitation in fee by will, a disposition is made of an estate to commence on the determination of the estate in fee, the law, except in the case of a devise over to take effect within the prescribed period, presumes the estate first granted will never end, and therefore regards the subsequent disposition as vain and useless: Shep. Touch., Prest. ed., 417. It makes no difference in the application of this rule that the condition on which the limitation over is made to depend is not *mala in se*. It is sufficient that it is against public policy. Thus in a recent case, where estates were limited to A. for ninety-nine years, if he should so long live, remainder to the heirs male of his body, with a proviso that if A. did not during his life-time acquire a certain dignity in the peerage the gift to his heirs male should be void, and the estate should go over to certain other persons, it was held that this conditional limitation was made to depend upon a condition which was against public policy, and therefore void, and that the estate vested in the eldest son of A. as heir male, discharged of the gift over: *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1. So in the case at bar, the limitation over, being upon an event which is too remote, and for that reason contrary to the policy of the law, cannot take effect. The estate therefore in the deacons and their successors remains unaffected by the gift over to John Hancock and his heirs. The doctrine on this point is briefly and clearly stated in the Touchstone: "No condition or limitation, be it by act executed, limitation of a use, or by devise or last will, that doth contain in it matter repugnant, or matter that is against law, is good. And therefore, in all such cases, if the condition be subsequent, the estate is absolute and the condition void; * * * and the same law is for the most part of limitations if they be repugnant, or against law, as is of conditions" in like cases: Shep. Touch. 129, 133; see *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1.

It is undoubtedly true that this construction of the devise defeats the manifest purpose of the testatrix, which was on a failure to use and occupy the premises as a parsonage in the manner described in the will to give the estate to John Hancock and his heirs. But no principle is better settled than that the

intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law: 1 Powell on Devises, 388, 389.

It is to be borne in mind, however, in this connection, that the claim set up by the heirs at law of the testatrix to the premises in controversy is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise is given by the residuary clause to John Hancock. Her heirs, therefore, can claim only by virtue of an arbitrary rule of law; and it certainly more accords with the general intent of the testatrix that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs at law, whom she so carefully disinherited. The court will not construe a conditional limitation as a mere condition, and thus defeat the estate first limited in a mode not contemplated by the testatrix.

Nor can the estate in question pass by the residuary clause. The testatrix having specifically devised the entire estate to the first taker, and upon the happening of the contingency over to another person, could not have intended to include it in the gift of the residue. She had given away all her estate and interest in the property, and nothing remained to pass by the residuary clause: 2 Powell on Devises, 102-104; *Hayden v. Sloughton*, 5 Pick. 538. It is not like a case of a gift on a valid condition, where the right or possibility of reverter remains in the donor or devisor, which would pass under a residuary clause, or in case of intestacy to the heirs of the donor; but it is the case of a devise in fee on a conditional limitation over, which is void in law. There is therefore no possibility or right of reverter left in the devisor which can pass to heirs or residuary devisees, and the limitation over being illegal and void, the estate remains in the first takers, discharged of the divesting gift. Nor does it make any difference in the application of this well-settled rule of law to the present case that the testatrix in terms declares that the gift to the deacons and their successors shall be void if the prescribed condition be not fulfilled. The legal effect of all conditional limitations is to make void and terminate the previous estate upon the happening of the designated contingency, and to vest the title in those to whom the estate is limited over by the terms of the gift or grant. The clause in the will, therefore, which

declares the gift void in the event of a breach of the condition, and directs that the premises shall revert to her estate, does not change the nature of the estate, nor add any force or effect to the condition which it would not have had at law if no such clause had been inserted in the will. It is simply a conditional limitation. The condition, being accompanied by a limitation over which is void in law, fails of effect, and the estate becomes absolute in the first takers. It could not revert to her estate, because there was no reversion left, the whole estate being limited over by the same devise. Such reversion could only exist in case of a simple condition, as we have already seen; and no such reverter can take place where the condition is accompanied by a limitation over. Besides, and this perhaps is the more satisfactory view of a devise of this nature, the condition operates only as a limitation, the rule being that when an estate is given over upon breach of a condition, and the same is devised by express words of condition, yet it will be intended as a limitation only. In all cases where a clause in a will operates as a condition to a prior estate, and a limitation over of a new estate, the condition takes effect only as a collateral determination of the prior estate, and not strictly as a condition. Therefore a limitation on a condition or contingency is not a condition. A clause creating contingent remainders or executory gifts by devise is properly a limitation, and though it be in such terms as to defeat another estate by way of shifting use or executory devise, still it is, strictly speaking, a limitation: 2 Cru. Dig., tit. 16, c. 2, sec. 30; Shep. Touch. 117, 126; *Lady Anne Fry's Case*, Vent. 202; *Rundale v. Eeley*, Cart. 171.

The case of *Austin v. Cambridgeport Parish*, 21 Pick. 215, cited and relied upon by the defendant Hancock, is widely different from the case at bar. That was a grant by deed of an estate, defeasible on a condition subsequent which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee-simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property. The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates and interests capable of conveyance, and constituting together an entire title or estate in fee-simple. This is very different from an executory devise, where only the

conditional estate is vested, and the persons to whom the limitation over is made are uncertain and incapable of being ascertained until the prescribed contingency happens, however remote that event may be. No conveyance of such an estate, by whomsoever made, could vest a good title, because it can never be made certain until after a breach of the condition in whom the estate is to vest. Besides, in that case there was nothing illegal or contrary to the policy of the law in the creation of the estate by the original grantor. The case of *Hayden v. Stoughton*, 5 Pick. 528, to which reference has also been made, did not raise any question as to the remoteness of the gift over, because it there vested, according to the construction given to the will, within twenty years from the death of the testator, and therefore within the prescribed period. In the case of *Brigham v. Shattuck*, 10 Id. 306, the court expressly avoid any decision on the validity of the devise over, and decide the case upon the ground that the defendant had no title to the premises in controversy.

The result, therefore, to which we have arrived on the whole case is, that the gift over to John Hancock is an executory devise, void for remoteness; and that the estate upon breach of the prescribed condition would not pass to John Hancock and his heirs by virtue of the residuary clause, nor would it vest in the heirs at law of the testatrix. But being an estate in fee in the deacons and their successors, and the gift over being void as contrary to the policy of the law by reason of violating the rule against perpetuities, the title became absolute, as a vested remainder in fee, after the decease of the mother of the testatrix, in the deacons and their successors, and they hold it in fee-simple, free from the divesting limitation.

A decree may therefore be entered for the sale of the estate, as prayed for in the bill, and for a reinvestment of the proceeds for the objects and purposes intended to be effected by the trusts declared in the will respecting the property in question.

LIMITATION OVER VOID FOR BEING TOO REMOTE, WHEN: See *Schultz v. Schultz*, 60 Am. Dec. 335, and note 361; *Pressley v. Davis*, 62 Id. 396, and note 401, collecting cases on effect of limitation over on indefinite failure of issue. To the point that limitation by way of executory devise, which may possibly not take effect within a term of a life or lives in being at testator's death, and twenty-one years and nine months thereafter, is void for remoteness, the principal case is cited in *Sears v. Russell*, 8 Gray, 97, 98; *Wells v. Heath*, 10 Id. 26; *Odell v. Odell*, 10 Allen, 5; *Otis v. McLellan*, 13 Id. 343; *Jackson v. Phillips*, 14 Id. 572; *Sears v. Putnam*, 102 Mass. 7; *Old South Society v. Crocker*, 119 Id. 25.

ABSOLUTE ESTATE VESTS IN FIRST TAKER WHERE LIMITATION OVER VOID for being too remote: See *Shephard v. Shephard*, 46 Am. Dec. 41; *Trumbull v. Gibbons*, 51 Id. 253. The principal case is cited to this point in *Locke v. Barbour*, 62 Ind. 586; *Sears v. Russell*, 8 Gray, 100; *Smith v. Harrington*, 4 Allen, 567; *Foedick v. Foedick*, 6 Id. 43; *Lovering v. Worthington*, 106 Mass. 88.

INTENT OF TESTATOR GOVERNS IN CONSTRUING DEVISE, except where it violates the rules of law: *Sears v. Russell*, 8 Gray, 94, 97, citing the principal case.

CONDITIONAL LIMITATION, AND NOT ESTATE UPON CONDITION, IS CREATED, where by the terms of its creation the estate is limited over to a third person in the event of a breach of a condition on which it is granted: *Lindsey v. Lindsey*, 45 Ind. 57; *Guild v. Richards*, 16 Gray, 317, citing the principal case. Where the estate is not a conditional limitation, but is granted on condition subsequent, the possibility of reverter remains in the grantor, to take effect on breach of the condition, and such estate is not affected by the rule against perpetuities: *French v. Old South Society*, 106 Mass. 489; *Tobey v. Moore*, 130 Id. 450; *Dunlap v. Bullard*, 181 Id. 163, all citing the principal case.

BELL v. JOSSELYN.

[8 GRAY, 309.]

AGENT IS GUILTY OF MISFASANCE IN NEGLIGENTLY DIRECTING WATER TO BE ADMITTED to water-pipes in a room in a house owned by his principal, but which is under his general management, without first examining the condition of such pipes, by reason of which injury results, and he is liable to the tenant of the shop below for damage therefrom; and the fact that the room in which the pipes are let to a tenant at that time does not release him from liability.

Tort for damages resulting from negligently causing water to be admitted to a pipe in the upper story of a building, so that it flowed through into the shop of plaintiff on the lower floor. The evidence showed that defendant, as agent for his wife, managed the building where the injury occurred, executing the leases and making repairs in his own name; that the room over plaintiff's shop was occupied by a tenant at will who agreed in part payment of his rent to pay water-rates for the whole block, but failed to do so, allowing the waste-pipe from his sink to become clogged; that the water was supplied by one main pipe, and had been cut off for non-payment of rates; that some of the tenants wanting water informed the defendant, who paid the rates and directed the water to be let on, without making an examination of the condition of the pipes; that the faucet in the aforesaid tenant's room had been left open, so that the water, after filling the sink, overflowed and soaked through the floor into plaintiff's shop, thereby damaging his property. The court instructed the jury that to enable the plaintiff to recover, he must prove four

things: 1. That the defendant had the general management and charge of the premises; 2. That the direction to let on the water was the cause of the injury; 3. That in ordering the letting on of the water, without first ascertaining that the faucet in the tenant's room was properly turned, the defendant was guilty of a want of ordinary care, that is, such care as a man of ordinary prudence would exercise in his own affairs; 4. That the plaintiff was in the exercise of ordinary care when he met with the said injury. Verdict for plaintiff. Defendant excepted.

C. E. and A. O. Allen, for the defendant.

S. E. Sewall, for the plaintiff.

By Court, METCALF, J. Our opinion is, that the rule of law on which the defendant attempts to sustain these exceptions is not applicable to this case. Assuming that he was a mere agent, yet the injury for which this action is brought was not caused by his non-feasance, but by his misfeasance. Non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all: 2 Inst. Cler. 107; 2 Dane's Abr. 482; 1 Ch. Pl., 6th Am. ed., 151; 1 Chit. G. P. 9. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a non-feasance. But if he had not caused the water to be let on, that non-feasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither non-feasance nor misfeasance. As the facts are, the non-feasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly from the act done, which was no less a misfeasance by reason of its being preceded by a non-feasance.

The instructions to the jury were sufficiently favorable to the defendant; and the jury under those instructions must have found all the facts necessary to the maintenance of the action.

Exceptions overruled.

AGENT IS PERSONALLY LIABLE FOR INJURY ARISING FROM NEGLIGENT ACTS amounting to a misfeasance: *Nowell v. Wright*, 3 Allen, 169; *Gilmore v. Driscoll*, 122 Mass. 208; *Osborne v. Morgan*, 130 Id. 103, 104, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED from *Brown Paper Co. v. Deas*, 123 Mass. 270, where the court held that as there was no positive act of negligence on the part of the agent, he was therefore not personally liable.

HILLIARD v. RICHARDSON.

[3 GRAY, 349.]

RELATION OF MASTER AND SERVANT DOES NOT EXIST between owner of land and a carpenter, over whom he has no direction or control, whom he employs to alter and repair certain buildings and furnish the materials therefor, for a specified price; their relation is that of employer and contractor, and such land-owner is therefore not liable for damage resulting to a third person, from the deposit, by a teamster employed by such carpenter, of boards intended to be used in such alterations and repairs in the highway in front of such land.

TORT for damages for injury sustained while driving upon a public highway. It appeared from the evidence that plaintiff, while driving in said highway, passed a pile of boards, at which his horse took fright and carried his wagon violently against a post, whereby plaintiff was thrown from the wagon and seriously injured. The boards had been placed in the highway near defendant's land by a teamster acting under the direction of one Shaw, a carpenter employed by defendant to make repairs and alterations in his buildings on his said land. Shaw, who had contracted to do the work and furnish the materials necessary in such repairs for a specified price, was in possession of such land under a license from defendant. The further facts appear in the opinion.

C. G. Loring, for the defendant.

R. Choate and J. W. May, for the plaintiff.

By Court, THOMAS, J. The questions raised by the report are upon the instructions given by the presiding judge to the jury. The material question, that upon which the case hinges, is whether, upon the facts reported, the defendant is liable for the acts and for the negligence and carelessness of Shaw.

In looking upon the case reported, it is to be observed: 1. That the acts done by Shaw, and which are charged as negligence, were not done by any specific direction, or order, or request of the defendant; 2. That between the defendant and Shaw the ordinary relation of master and servant did not exist; 3. That the acts done, and which are charged as negligence, were not done upon the land of the defendant; they did not consist in the creating or suffering of a nuisance upon his own land, to the injury of another; 4. That the boards placed in the highway were not the property of the defendant; that he had no interest in them, and could exercise no control over them; 5. That the defendant did not assume to exercise any control over them;

6. That there is no evidence of any purpose on the part of the defendant to injure the plaintiff or anybody else, or so to use his property, or suffer it to be so used, as to occasion an injury.

Was the defendant liable for the negligent acts of Shaw in the use of the highway? As a matter of reason and justice, if the question were a new one, it would be difficult to see on what solid ground the claim of the plaintiff could rest. But he says that such is the settled law of this commonwealth, and that the question is now no longer open for discussion. Three cases are especially relied upon by the plaintiff as settling the rule in Massachusetts. They are *Stone v. Codman*, 15 Pick. 297; *Lowell v. Boston & L. R. R. Co.*, 23 Id. 24 [34 Am. Dec. 33]; and *Earle v. Hall*, 2 Met. 353.

Stone v. Codman, was this: The defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant's stores, in the city of Boston, to the common sewer. By reason of the opening made by Lincoln and the laborers in his employment, water was let into the plaintiff's cellar, and his goods were wet. 1. Lincoln procured the materials and hired the laborers, charging a compensation for his services and disbursements; 2. The acts causing the injury to the plaintiff's goods were done upon the defendant's land, and in the use of it for the defendant's benefit; 3. There was no contract, written or oral, by which the work was to be done for a specific price, or as a job; 4. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed. The chief justice, in delivering the opinion of the court, said: "Without reviewing the authorities, and taking the general rule of law to be well settled that a master or principal is responsible to third persons for the negligence of a servant by which damage has been done, we are of opinion that if Lincoln was employed by the defendant to make and lay a drain for him, on his own land, and extending thence to the public drain, he, Lincoln, procuring the necessary materials, employing laborers, and charging a compensation for his own services and his disbursements, he must be deemed in a legal sense to have been in the service of the defendant, to the effect of rendering his employer responsible for want of skill or want of due diligence and care; so that if the plaintiff sustained damage by reason of such negligence, the defendant was responsible for such damage." The case well stands on the relation of master and servant. The work was under the control of the defendant. He could change, suspend, or terminate it at his pleasure. Lincoln was upon the

land with only an implied license, which the defendant could at any moment revoke. The work was done by Lincoln, not on his own account, but on the defendant's. The defendant was, indeed, acting throughout by his servants. The injury was done by the escape of water from land of the defendant to that of the plaintiff, which the defendant could have and was bound to have prevented.

The second case relied upon by the plaintiff is that of *Lowell v. Boston & L. R. R. Co., supra*. In a previous suit, *Currier v. Lowell*, 16 Pick. 170, the town of Lowell had been compelled to pay damages sustained by Currier by reason of a defect in one of the highways of the town. That defect was caused in the construction of the railroad of the Boston & Lowell company. It consisted in a deep cut through the highway, made in the construction of the railroad. Barriers had been placed across the highway to prevent travelers from falling into the chasm. It became, in the construction of the railroad, necessary to remove the barriers for the purpose of carrying out stone and rubbish from the deep cut. They were removed by persons in the employ of the corporation, who neglected to replace them. Currier and another person, driving along the highway in the night-time, were precipitated into the deep cut, and seriously injured. Currier brought his action against the town of Lowell, and recovered damages. This action was to recover of the railroad corporation the amount the town had been so compelled to pay. The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and had employed the workmen. This defense was not sustained, nor should it have been. The defendants had been authorized by their charter to construct a railroad from Boston to Lowell, four rods wide through the whole length. They were authorized to cross turnpikes or other highways, with power to raise or lower such turnpikes or highways, so that the railroad, if necessary, might pass conveniently over or under the same: Stats. 1830, c. 4, secs. 1, 11. Now, it is plain that it is the corporation that are intrusted by the legislature with the execution of these public works, and that they are bound, in the construction of them, to protect the public against danger. It is equally plain that they cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to

the purpose of the railroad, and under authority of the corporation vested in them by law for the purpose. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; and that servant had the care and supervision of them. The accident occurred from the negligence of a servant of the railroad corporation acting under their express orders. The case, then, of *Lowell v. Boston & L. R. R. Co.*, 23 Pick. 24 [34 Am. Dec. 33], stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say that the fact of Noonan being a contractor for this section did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant acting under their orders.

The only respect, it seems to us, in which this case aids the doctrine of the plaintiff is that the learned judge who delivered the opinion of the court cites with approbation the case of *Bush v. Steinman*, 1 Bos. & Pul. 404, as "fully supported by the authorities and by well-established principles." It is sufficient to remark, in passing, that the decision of the case before the court did not involve the correctness of the rule in *Bush v. Steinman, supra*.

The case of *Earle v. Hall*, 2 Met. 353, is the third case cited by the plaintiff as affirming the doctrine upon which he relies. Hall agreed to sell land to one Gilbert; Gilbert agreed to build a house upon and pay for the land. While the agreement was in force, Gilbert, in preparing to build the house on his own account, by workmen employed by him alone, undermined the wall of the adjoining house of the plaintiff. It was held that Hall was not answerable for the injury, although the title to the land was in him at the time the injury was committed. The general doctrine is stated to be, that we are not merely to inquire who is the general owner of the estate in ascertaining who is responsible for acts done upon it injurious to another, but who has the efficient control, for whose account, at whose expense, under whose orders is the business carried on, the conduct of which has occasioned the injury. The case of *Bush v. Steinman, supra*, is cited as a leading case, "very peculiar and much discussed;" but we do not perceive that the point it decides is affirmed. The general scope of the reasoning in *Earle v. Hall, supra*, as well as the express point decided, are adverse to it. These cases, neither in the points decided nor the prin-

ciples which they involve, support the rule contended for by the plaintiff. But the plaintiff says that the well-known case of *Bush v. Steinman, supra*, is directly in point, and that that case is still the settled law of Westminster Hall. If so, as authority, it would not conclude us; though, as evidence of the law, it would be entitled to high consideration.

Upon this case of *Bush v. Steinman, supra*, three questions arise: 1. What does it decide? 2. Does it stand well upon authority or reason? 3. Has its authority been overthrown or substantially shaken and impaired by subsequent decisions?

1. The case was this: A., having a house by the roadside, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; C. with D. to furnish the materials; the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. Held, that A. was answerable for the damage sustained.

2. At the trial, Chief Justice Eyre was of opinion that the defendant was not answerable for the injury. In giving his opinion at the hearing in bank, he says he found great difficulty in stating with accuracy the grounds on which the action was to be supported; the relation of master and servant was not sufficient; the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seemed to be too large and loose. He relied as authorities upon three cases only: *Stone v. Cartwright*, 6 T. R. 411; *Littledale v. Lonsdale*, 2 H. Black. 267; and a case stated upon the recollection of Mr. Justice Buller.

Stone v. Cartwright, supra, lays no foundation for the rule in *Bush v. Steinman, supra*. The decision was but negative in its character. It was, that no action would lie against a steward, manager, or agent, for the damage of those employed by him in the service of his principal. This is the entire point decided. Lord Kenyon said: "I have ever understood that the action must be brought against the hand committing the injury, or against the owner for whom the act was done." The injury complained of was done upon the land of the defendant, and by his servants. It consisted in so negligently working the defendant's mine as to undermine the plaintiff's ground and buildings above it, so that the surface gave way. The mine was in the possession and occupation of the defendant; the injury was direct and immediate; the workmen were the servants of the owner.

The case of *Littledale v. Lonsdale, supra*, in its main facts, cannot be distinguished from *Stone v. Cartwright, supra*. It stands

upon the same grounds. The defendant's steward employed the under-workmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants.

The third case was but this: A master having employed his servant to do some act, this servant, out of idleness, employed another to do it. And that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff for which the master was held liable. What was the nature of the acts done does not appear, and whether the case was rightly decided or not, it is difficult to see any analogy between it and the case the lord chief justice was considering.

Mr. Justice Heath referred to the action for defamation brought against Tattersall, who was the proprietor of a newspaper with sixteen others. The libel was inserted by the persons whom the proprietors had employed by contract to collect the news and compose the paper, yet the defendant was held liable. It would seem to be not very material who composed the paper, but who owned and published it.

Mr. Justice Heath also cited as in point the case of *Rosewell v. Prior*, 2 Salk. 460, which was an action upon the case for obstructing ancient lights. The defendant had erected upon his land the obstruction complained of. There had been a former recovery for the erection; this suit was for the continuance. The premises of the defendant had been leased. The question was whether the action would lie for the continuance after his lease. "*Ex per cur.* It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it; he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions." Mr. Justice Cooke, in addition to the cases of *Stone v. Cartwright, supra*, and *Littledale v. Lonsdale, supra*, alluded also to the case of *Michael v. Alestree*, 2 Lev. 172, in which it was held that an action might be maintained against a master for damage done by his servant to the plaintiff in exercising his horses in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there: See *Parsons v. Winchell*, 5 Cush. 595 [52 Am. Dec. 745].

The examination of these cases justifies the remark that *Bush v. Steinman*, 1 Bos. & Pul. 404, does not stand well upon the authorities, and is not a recognition of principles before that time settled. The rule it adopts is apparently for the first time announced. Does it stand well upon the reasoning of the

court? We think all the opinions given in it lose sight of these two important distinctions: in the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents under the efficient control of the defendants, or were nuisances created upon the premises of the defendants, to the direct injury of the estate of the plaintiffs. The servant of the lime-burner was not the servant of the defendant; over him the defendant had no control whatsoever; to the defendant he was not responsible. There was no nuisance created on the defendant's land. It does not appear that the defendant owned the fee of the highway. The case is put on the ground that the lime was put near the premises of the defendant, and with a view of being carried upon them. The lime was not on the defendant's land; he did not direct it to be put there; he had not the control of the man who put it there.

Mr. Justice Heath said: "I found my opinion on this single point, viz., that all the subcontracting parties were in the employ of the defendant." This is not so, unless it be true that a man who contracts with a mason to build a house employs the servant of the man who burns the lime. Mr. Justice Rooke said: "The person from whom the whole authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." It cannot be meant that one who builds a house is to be responsible for the negligence of every man and his servants who undertakes to furnish materials for the same. Such a rule would render him liable for the most remote and inconsequential damages. But the act complained of did not result from the authority of the defendant. The authority under which the servant of the lime-burner acted was that of his master. And neither the lime-burner nor his servant was acting under the authority of the defendant, or subject to his control. The defendant might with the same reason have been held liable for the carelessness of the servant who burned the lime, and of the servant of the man who furnished the coals to burn the lime.

3. Has the doctrine of the case of *Bush v. Steinman*, 1 Bos. & Pul. 404, been affirmed in England? or has it been overruled and its authority impaired? The plaintiff cites the case of *Sly v. Edgely*, 6 Esp. 6, at *nisi prius*. The defendant, with others, then owning several houses, the kitchens of which were subject to be overflowed, employed a brick-layer to sink a large sewer in the street. The brick-layer opened the sewer and left it open, and the plaintiff fell in. It was contended that the brick-layer

was not the servant of the defendant. He was employed to do a certain act, and the mode of doing it, which had caused the injury, was certainly his own. Lord Ellenborough is reported as saying: "It is the rule of *respondeat superior*; what the brick-layer did was by the defendant's direction." It does not appear how the brick-layer was employed. If not by independent contract, the case stands very well on the relation of master and servant. A case at *nisi prius* so imperfectly reported can have but little weight.

Another case at *nisi prius* was that of *Matthews v. West London Water Works*, 3 Camp. 403, in which the defendants, contracting with pipe-layers to lay down pipes for the conveyance of water through the streets of the city, were held liable for the negligence of workmen employed by the pipe-layers. The case is very briefly stated, and no reasons given by Lord Ellenborough for his opinion reported. It may stand on the ground that the defendants, having a public duty to discharge, as well as right given, could not delegate this trust so as to exempt themselves from responsibility. This case is alluded to in *Overton v. Freeman*, 11 Com. B. 872, hereafter to be examined, where Maule, J., makes the following remarks concerning it: "That is but a *nisi prius* case; the report is short and unsatisfactory; and the particular circumstances are not detailed."

In *Harris v. Baker*, 4 Mau. & Sel. 27, and in *Hall v. Smith*, 2 Bing. 156, it was held that trustees or commissioners intrusted with the conduct of public works were not liable for injuries occasioned by the negligence of the workmen employed under their authority. These cases stand upon the ground that an action cannot be maintained against a man acting gratuitously for the public for the consequences of acts which he is authorized to do, and which on his part are done with due care and attention. They give no sanction whatever to the doctrine of *Bush v. Steinman*, 1 Bos. & Pul. 404.

In *Randleson v. Murray*, 8 Ad. & El. 109, a warehouseman in Liverpool employed a master porter to remove a barrel from his warehouse. Through the negligence of his men the tackle failed, and the barrel fell and injured the plaintiff. Held, that the warehouseman was liable. The case is put distinctly on the relation of master and servant. Lord Denman said: "Had the jury been asked whether the porters whose negligence occasioned the accident were the servants of the defendant, there can be no doubt they would have found in the affirmative." The injury occurred also in the direct use of the defendant's estate.

In *Burgess v. Gray*, 1 Com. B. 578, the defendant, owning and occupying premises adjoining the highway, employed one Palmer to make a drain from his land to the common sewer. In doing the work, the men employed by Palmer placed gravel on the highway, in consequence of which the plaintiff, in driving along the road, sustained a personal injury. There was evidence that upon the defendant's attention being called to the gravel he promised to remove it. The matter left to the jury was whether the defendant wrongfully put, or caused to be put, the gravel on the highway. "I think," says Tindal, C. J., "there was evidence to leave to the jury in support of that charge. If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my brother Byles, and that the damage should be made good by the contractor, and not by the individual for whom the work was done." After adverting to the evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction, he says: "I therefore think the case is taken out of the rule in *Bush v. Steinman, supra*, which is supposed to be inconsistent with the later authorities." Coltman, J., said: "I think there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer." Cresswell, J., said: "No precise contract for the work was proved; nor was it shown that Palmer was employed to do the work personally, the mode of doing it being left to his judgment and discretion. I think there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road." Erle, J., said: "The work was done with the knowledge of the defendant, and under his superintendence, and for his benefit." This well-considered case, it is plain, so far from affirming the rule in *Bush v. Steinman, supra*, is carefully and anxiously taken out of it by the counsel and by the court, with the strongest intimation by the latter that, but for the difference, the action could not be maintained.

The latest case in England referred to in the learned argument of the plaintiff's counsel, as affirming the doctrine of *Bush v. Steinman, supra*, is *Sadler v. Henlock*, 4 El. & Bl. 570, in the queen's bench, 1855. The defendant, with the consent of the owner of the soil and the surveyor of the district, employed one Pearson, a laborer, but skilled in the construction of drains, to

cleanse a drain running from the defendant's garden under the public road, and paid five shillings for the job. Held, that the defendant was liable for an injury occasioned to the plaintiff by reason of the negligent manner in which Pearson had left the soil of the road over the drain. The case is put by all the judges distinctly on the relation of master and servant. And Crompton, J., said: "The test here is whether the defendant retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee. It is only on the ground of a contractor not being a servant that I can understand the authorities." The case of *Bush v. Steinman, supra*, is not referred to by either of the justices; but the distinction of servant and contractor runs through the whole case, a distinction which is wholly inconsistent with the doctrine of *Bush v. Steinman*.

In *Laugher v. Pointer*, 5 Barn. & Cress. 547, S. C., 8 Dowl. & Ry. 556 (1826), where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to the horse of a third person, it was held by Lord Tenterden, C. J., and Littledale, J., that the owner of the carriage was not liable for such injury, Bayley and Holroyd, JJ., dissenting. This case is, in substance, the one put by Mr. Justice Heath, in illustration and support of the judgment in *Bush v. Steinman, supra*. In the opinions of Lord Tenterden and of Littledale, J., the doctrines of *Bush v. Steinman, supra*, in their application to personal property, are examined and their soundness questioned.

In *Quarman v. Burnett*, 6 Mee. & W. 499 (1840), the same question arose in the exchequer as in *Laugher v. Pointer, supra*, in the king's bench, and the opinions of Lord Tenterden and Littledale, J., were affirmed in a careful opinion pronounced by Baron Parke. In the course of it, he says: "Upon the principle that *qui facit per alium facil per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer, he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent

authorized by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist." These cases, however, do not overrule *Bush v. Steinman*, 1 Bos. & Pul. 404, as to the liability of owners of real estate.

The case of *Milligan v. Wedge*, 12 Ad. & El. 737, S. C., 4 Per. & Dav. 714 (1840), is also in relation to the use of personal property, and rests upon the rule settled in *Quarman v. Burnett*, *supra*. But in this case Lord Denman suggests a doubt whether the distinction as to the law in cases of fixed and movable property can be relied on. The case of *Rapson v. Cubitt*, 9 Mee. & W. 710 (1842), was this: The defendant, a builder, employed by the committee of a club to make certain alterations at the club-house, employed a gas-fitter by a subcontract to do that part of the work. In the course of doing it, by the negligence of the gas-fitter, the gas exploded and injured the plaintiff. Held, that the defendant was not liable. The reasons upon which the decision is based do not well consist with the rule in *Bush v. Steinman*, *supra*. The case of *Allen v. Hayward*, 7 Ad. & El. N. R. 960 (1845), is still more directly adverse. But we pass from these to cases directly in point.

In the cases of *Reedie v. London & N. W. Railway*, 4 Exch. 244, 254 (1849), the defendants, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. In an action against the company, it was held that they were not liable, the terms of the contract making no difference. In the judgment of the court given by Baron Rolfe (now Lord Chancellor Cranworth), alluding to the supposed distinction as to real property, the court say: "On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and in fact, that, according to the modern decisions, *Bush v. Steinman*, *supra*, must be taken not to be law, or at all events, that it cannot be supported on the ground on which the judgment of the court proceeded." Without sanctioning this doctrine, as it affects a public trust, it is very plain that it directly overrules the doctrine

of *Bush v. Steinman, supra*. The case of *Knight v. Fox*, 5 Exch. 721 (1850), is, if possible, a stronger case in the same direction—a decision which it is plain could not have been made if the doctrines of *Bush v. Steinman, supra*, were the law of Westminster Hall.

There are three cases remaining. In *Overton v. Freeman*, 11 Com. B. 867 (1851), A. contracted to pave a district, and B. entered into a subcontract with him to pave a particular street. A. supplied the stones, and his carts were used to carry them. B.'s men, in the course of the work, negligently left a heap of stones in the street. The plaintiff fell over them and broke his leg. It was held that A. was not liable, even though the act complained of amounted to a public nuisance. And Maule, J., said that the case of *Bush v. Steinman, supra*, has "been considered as having laid down the law erroneously."

In *Peachey v. Rowland*, 13 Com. B. 182 (1853), the defendants contracted with A. to fill in the earth over a drain which was being made for them across a portion of the highway from their house to the common sewer. A., after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained an injury. The case had this other feature: A few days before the accident, and before the work was finished, one of the defendants had seen the earth so heaped over a portion of the drain; but beyond this there was no evidence that either defendant had interfered with or exercised any control over the work. It was held there was no evidence to go to the jury of the defendants' liability. *Bush v. Steinman, supra*, appears not to have been cited by counsel, or alluded to by the court. The still more recent case of *Ellis v. Sheffield Gas Consumers' Co.*, 2 El. & Bl. 767 (1853), cited by the counsel for the plaintiff, only determined that a party employing another to do an act unlawful in itself will be liable for an injury such act may occasion—very familiar and well-settled law.

Bush v. Steinman, supra, is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been. No one can have examined the case without feeling the difficulty of that clear-headed judge, Chief Justice Eyre, of knowing on what ground its decision was put. It could not stand on the relation of master and servant. That relation did not exist. It could not stand upon the ground of the defendant having created or suffered a nuisance upon his own land, to the injury of his neighbor's

property. The lime was on the highway. There is no rule to include it but the indefinitely broad and loose one that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do—a rule which ought to have been and was expressly repudiated.

The case of *Leslie v. Pounds*, 4 Taunt. 649, not cited in the argument, has some resemblance to the cases before referred to. This was an action against the landlord of a house leased, who, under contract with the tenant, who was bound to repair, employed workmen to repair the house, and superintended the work. Being remonstrated with by the commissioners of pavements as to the dangerous state of the cellar, he promised to take care of it, and had put up some boards temporarily as a protection to the public. They proved insufficient, and the plaintiff falling through, the landlord was held liable. The case was decided on the ground that the landlord was making the repairs, and that the workmen were employed by him and were his servants. The suggestion is made, that whatever may be the result of the later cases in England, the doctrine of *Bush v. Steinman*, 1 Bos. & Pul. 404, has been affirmed in this country. The cases in this court we have already examined.

The case of *Bailey v. Mayor etc. of New York*, 3 Hill (N. Y.), 531 [38 Am. Dec. 609], S. C., 2 Denio, 433, was an action brought against the corporation of New York for the negligent and unskillful construction of the dam for the water-works at Croton river, by the destruction of which injury was occasioned to the mills of the plaintiff. The city was held responsible. This case rests well upon the ground that where persons are invested by law with authority to execute a work involving ordinarily the exercise of the right of eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power with which they have been intrusted.

Blake v. Ferris, 5 N. Y. 48 [55 Am. Dec. 304], seems to conflict with *Bailey v. Mayor etc. of New York, supra*. Certain persons were permitted to construct a public sewer at their own expense; they employed another person to do it at an agreed price for the whole work; the plaintiffs received an injury from the negligent manner in which the sewer was left at night. It was held that the persons who were authorized to make the sewer were not responsible for the negligence of the servants of the contractor. This case utterly rejects the rule of *Bush v. Steinman, supra*.

The case of *Stevens v. Armstrong*, 6 N. Y. 435, was this: A. bought a heavy article of B., and sent a porter to get it. By permission of A., the porter used his tackle and fall; through negligence, the porter suffered the article to drop, by which C. was injured. It was held that the porter acted as the servant of B., and that A. was not answerable. Yet this was an injury done on A.'s estate, by his permission, and in the use of his property. This case also rejects the rule of *Bush v. Steinman, supra*. In *Lesher v. Wabash Navigation Co.*, 14 Ill. 85 [56 Am. Dec. 494], where a corporation was authorized to take materials to construct public works, and contracted with others to do the work and find the materials, and the contractors nevertheless took the materials under the authority granted to the corporation, the corporation was held liable therefor. If the court could find that the materials were taken under the authority of the corporation, the case will stand perfectly well under the rule of *Lowell v. Boston & L. R. R. Co.*, 23 Pick. 24 [38 Am. Dec. 33], and *Bailey v. Mayor etc. of New York*, 3 Hill (N. Y.), 531 [38 Am. Dec. 609]. The cases of *Willard v. Newbury*, 22 Vt. 458, and *Batty v. Duxbury*, 24 Id. 155, rest on the same principles.

In the case of *Wiswall v. Brinson*, 10 Ired. 554, the court held an owner of real estate responsible for the negligence of the servants of a carpenter with whom the defendant had contracted, for a stipulated price, to remove a barn on to his premises. This case, in which, however, there was a divided judgment, Ruffin, C. J., dissenting in a very able opinion, certainly sustains the doctrine of *Bush v. Steinman*, 1 Bos. & Pul. 404.

De Forrest v. Wright, 2 Mich. 368, not cited, is in direct conflict with the rule of *Bush v. Steinman, supra*. A public, licensed drayman was employed to haul a quantity of salt from a warehouse and deliver it at the store of the employer at so much a barrel. While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. It was held that the employer was not liable for the injury, the drayman exercising a distinct and independent employment, and not being under the immediate control and direction or supervision of the employer. This is a well-considered case, rejecting the rule of *Bush v. Steinman, supra*, and sanctioning the result to which we have been brought in the case at bar.

We have thus, at the risk of tediousness, examined the case at bar as one of authority and precedent. The clear weight and

preponderance of the authorities at common law is against the rule given to the jury. The rule of the civil law seems to have limited the liability to him who stood in the relation of *pater familias* to the person doing the injury: Inst., lib. 4, tit. 5, secs. 1, 2; 1 Domat, pt. 1, lib. 2, tit. 8, sec. 1; Dig., lib. 9, tit. 2, sec. 1. Viewing this as a question, not of authority, but to be determined by the application to these facts of settled principles of law, upon what principle can the defendant be held responsible for this injury? He did not himself do the act which caused the injury to the plaintiff; it was not done by one acting by his command or request; it was not done by one whom he had the right to command, over whose conduct he had the efficient control, whose operations he might direct, whose negligence he might restrain. It was not an act done for the benefit of the defendant, and from the doing of which an implied obligation for compensation would arise. It was not an act done in the occupation of land by the defendant, or upon land to which, upon the facts, he had any title. To say that a man shall be liable for injuries resulting from acts done near to his land, is to establish a rule as uncertain and indefinite as it is manifestly unjust. It is to make him liable for that which he cannot forbid, prevent, or remove. The case cannot stand on the relation of master and servant. It cannot stand upon the ground of nuisance erected by the owner of land, or by his license, to the injury of another. It cannot stand upon the ground of an act done in the execution of a work under the public authority, as the construction of a railroad or canal, and from the responsibility for the careful and just execution of which public policy will not permit the corporation to escape by delegating their power to others. It can only stand where *Bush v. Steinman*, *supra*, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do—to adopt which would be to ignore all limitations of legal responsibility.

As the determination of this, the first and most material of the exceptions, may probably finally dispose of the cause, we have not considered the other points of exception to the rulings of the presiding judge.

New trial granted.

EMPLOYER IS NOT GENERALLY LIABLE FOR ACTS OF INDEPENDENT CONTRACTOR: See *Stone v. Cheshire Railroad Co.*, 51 Am. Dec. 200-206, note, where other cases are collected and reviewed: *Blake v. Ferris*, 55 Id. 304, and note collecting other cases 317-321.

THE PRINCIPAL CASE IS CITED to the point that the owner of land is not liable for injury arising from acts of independent contractor or his servant or employee, where the work contracted for is not itself a nuisance, in *Stephens v. Brown*, 40 Ill. 435; *Prairie State L. & T. Co. v. Doig*, 70 Id. 54; *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 557; *Ryan v. Curran*, 64 Id. 354; *Logansport v. Dick*, 70 Id. 78; *Linton v. Smith*, 8 Gray, 148, 149; *Brackett v. Lubke*, 4 Allen, 140; *Forsyth v. Hooper*, 11 Id. 422; *Wendell v. Pratt*, 12 Id. 470; *Coomes v. Houghton*, 102 Mass. 213; *Connors v. Hennessey*, 112 Id. 99; *Gilmore v. Driscoll*, 122 Id. 208. In *Chicago City v. Robbins*, 2 Black, 428, the principal case is cited, and the distinction referred to, between the liability of a private person and that of a municipal corporation for acts of a contractor which cause injury. In *Johnson v. Boston*, 118 Mass. 117, the distinction is pointed out between the principal case and the liability where an injury arises from the negligence of one in the general employ of a contractor, but who is under the direction of the original employer; and in *Gorham v. Gross*, 125 Id. 240; *Milchey v. Methodist Religious Society*, Id. 489, the distinction is made between the principal case and the case where the very thing contracted for is the cause of the injury.

NORTON v. DOHERTY.

[3 GRAY, 372.]

JUDGMENT ON MERITS, IN ACTION OF TORT for false representations as to soundness of a horse, is a bar to a subsequent action of contract on the same transaction, founded on a representation of soundness of the horse.

ACTION on contract. Plaintiff alleged that defendant had promised to induce plaintiff to exchange horses with him; that the horse given by defendant in exchange was not lame, and that on such promise the exchange was made, whereby plaintiff had suffered damage. Defendant answered that a recovery had been had by him in an action of tort based on the same transaction. At the trial it was admitted that the transaction in both actions was the same. The court ruled that the former judgment was a bar to this action. Plaintiff excepted.

J. Q. A. Griffin, for the plaintiff.

R. F. Fuller, for the defendant.

By Court, SHAW, C. J. On consideration, the court are of opinion that the former judgment was a good bar, because the first action was brought to recover damages for the same wrong or injury, and because it could be supported by the same evidence.

The only difference in the declarations is that in the former case it was alleged that the defendant represented the condition of his horse; that such representation was false; that relying on

it, the plaintiff made the exchange of horses, and was deceived. In the present case, it is alleged that the defendant promised, etc., and the promise was not true, by reason whereof the plaintiff sustained damage.

In general, a promise is executory—a stipulation to do something, and then requires a consideration to support an action. But it is not necessarily so. It may be a promise that something has been done, or now exists, or is true. In that case it has all the characteristics of a warranty. And it has been held that so far as a warranty is a contract, and may be declared on as such, *assumpsit* is the proper form of action. In this respect a promise and a warranty that a certain fact is true have the same legal effect, and a warranty may be declared on as a promise: *Stuart v. Wilkins*, 1 Doug. 18. The principle that on the same facts the plaintiff has an election of remedies, and may sue either in tort or contract, is traced back as a well-settled rule to *Slade's Case*, 4 Co. 92.

Where upon a sale of goods there is a warranty of quality or condition, and by parity of reasoning a promise, which proves not to be true, the plaintiff may declare in tort, and give such warranty in evidence as conclusive to maintain the action. This goes on the theory that by such warranty the purchaser is lulled into security, and looks no further; and the seller, by taking upon himself to warrant a fact as true which turns out not to be true, does in effect deceive the purchaser. In such case it is not necessary to prove that defendant acted knowingly, because by his positive promise he takes all the consequences of its being true, whether true or not: *Williamson v. Allison*. 2 East, 446. But it is quite clear that in the same case the plaintiff, if he had thought fit, might have brought his action of contract on the warranty, and recovered. Indeed, all the cases, now very numerous, which decide that the plaintiff may waive the tort and declare in *assumpsit*, are precedents to show that a plaintiff has an election of remedies. But it follows, as a necessary legal consequence, that when a plaintiff elects one, and pursues it to judgment, such judgment is conclusive, and is a bar to another action.

If, therefore, in the former case for deceit, the plaintiff had given in evidence what he now alleges to be true, and lays down as the *gravamen* of his case, to wit, that the defendant promised that the horse was sound, when in truth he was not, it would have supported the declaration in that case, charging the false representation as a deceit, in an action of tort.

No particular words are necessary to constitute a warranty. If a man, at the time of the sale, says, "this horse is sound," that is a warranty. If previously, it may be regarded as a representation: Best, C. J., in *Salmon v. Ward*, 2 Car. & P. 211.

In all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury, upon a state of facts which will support either, an adjudication in one, whichever he may elect, is upon principle a bar to the other.

Exceptions overruled.

JUDGMENT, WHEN BAR TO SUBSEQUENT ACTION FOR SAME CAUSE, though in another form: See *Sheldon v. Carpenter*, 55 Am. Dec. 301, and cases collected in note 304. The principal case is cited to this point in *Smith v. Way*, 9 Allen, 473; *Bartlett v. Boston Gas Light Co.*, 122 Mass. 217.

WAY v. RICHARDSON.

[3 Gray, 412.]

POSSESSION OF PROMISSORY NOTE INDORSED IN BLANK IS PRIMA FACIE EVIDENCE OF TITLE, and evidence is not admissible at the trial, in an action thereon, to prove that plaintiff never owned the note, nor paid anything for it, nor employed counsel to prosecute the action, nor had any interest in the suit, if the signature, indorsement, or delivery of the note are not denied in the answer.

ACTION on a promissory note made by defendant and payable to his order, and indorsed by him in blank, and then indorsed, "Without recourse, J. Wetherbee, jun." Defendant answered that the note was executed for the accommodation of Nathaniel Richardson, without consideration, and by him delivered to Wetherbee, and was, when due, paid by said Nathaniel Richardson to said Wetherbee, then the holder of it, and that plaintiff had received it after it had been paid and with knowledge thereof, and that he paid no consideration for it. On the trial plaintiff read the note and indorsements, and rested. Defendant then offered to prove that plaintiff never owned the note, nor paid anything for it, nor employed counsel to prosecute the action, nor had any interest in the suit. Plaintiff objected, on the ground that such evidence was not admissible under defendant's answer, and if proved would constitute no defense. The evidence was rejected. Defendant offered no further evidence, and the jury was directed to return a verdict for plaintiff. Defendant excepted.

I. W. Richardson, in propria persona.

L. H. Boutelle, for the plaintiff.

By Court, SHAW, C. J. The evidence offered by the defendant was rightly rejected. Independently of the consideration that it was not specified in the answer, the evidence would have constituted no defense. The action was upon a note made by the defendant, payable to his own order, and by him indorsed in blank, and then by Wetherbee indorsed in blank, by which the plaintiff, if holder, had a right to fill up the indorsements, and make the note payable to himself, as second indorsee, which we are to presume was done, or considered as done at the trial. The genuineness of the signature and indorsements was admitted. This, with the production of the note, was *prima facie* evidence of title, and good unless rebutted; for although Wetherbee's indorsement was "without recourse," yet this was as effective to transfer the note as if those words had not been used; it was a blank indorsement.

The plaintiff, by his attorney, whose authority to appear it was then too late to contest, produced the note at the trial; the plaintiff's possession must be presumed to be lawful, and to have existed from the time of the indorsement until the contrary appeared; and no evidence to the contrary was offered. It was not competent for the defendant to deny that the plaintiff was the owner and holder of the note without traversing the signature, or the indorsement, or the delivery of the note, which he did not offer to do.

The plaintiff was not bound to prove that he gave value for it; the first indorsee might have given it to him, or authorized him to sue on it as his trustee. If the plaintiff's possession of the note was lawful, it must have been delivered to him by the holder.

Had the defendant even proved what in his answer he proposed to prove, that the note was indorsed to the plaintiff after it was due, this would not have been of itself a defense. A note does not cease to be negotiable and transferable by indorsement or delivery when it becomes due. Such proof would merely have let in the defendant to prove that it had been paid to some antecedent holder, or that he had a good defense against the plaintiff's indorser. But no offer was made of any such proof.

The cases cited by the defendant afford no authority to sustain a contrary view. In *Richardson v. Lincoln*, 5 Met. 201,

there was a constructive delivery of the note to the plaintiff's attorney, simultaneous with the indorsement. In *Emmett v. Tottenham*, 8 Exch. 884, the decision was placed distinctly on the ground that the action was brought upon a copy of the note, and that there was no delivery of the note to the plaintiff, or to any one as his agent, until some time after the commencement of the action.

Exceptions overruled.

POSSESSION OF NOTE INDORSED IN BLANK, OR PAYABLE TO BEARER, IS PRIMA FACIE EVIDENCE OF TITLE: See *Morgan v. Yarborough*, 33 Am. Dec. 554, note; *Eddy v. Bond*, 36 Id. 767; *Whiteford v. Burckmyer*, 39 Id. 641, and note citing cases 657; *Petree v. Prout*, post, 778, and note. The principal case is cited to this point in *Andrews v. Lyon*, 11 Allen, 350. In *Smith v. Sac County*, 11 Wall. 350, and *Railroad Company v. National Bank*, 102 U. S. 36, the court, in approving the principal case, say that plaintiff in an action on such a note need prove nothing other than the signatures, and introduce the note itself, and he will then be presumed to be the holder for value, and without notice of any existing equities affecting it.

COMMONWEALTH v. UPRICHARD.

[3 Gray, 494.]

LARCENY OF GOODS IN FOREIGN COUNTRY AND BRINGING THEM INTO COMMONWEALTH of Massachusetts does not constitute larceny, in Massachusetts, for which an indictment will lie.

INDICTMENT for larceny. The opinion states the case.

J. H. Clifford, attorney general, for the commonwealth.

J. H. Bradley, for the defendant.

By Court, SHAW, C. J. The defendant, together with Thomas Carey, was indicted in the municipal court for larceny, in stealing a large number of sovereigns and other gold and silver coins properly enumerated and described. The indictment charges that the two defendants, at Boston, on the twenty-seventh of July, 1854, the gold pieces and other coins, the property of George D. Twining, in his possession then and there being, feloniously did steal, take, and carry away.

The evidence failing to prove a joint possession of the stolen property in this commonwealth, the prosecuting attorney submitted to a verdict in favor of Carey, and proceeded against Uprichard; and afterwards a new indictment was found by the same grand jury, so that each was tried as upon a separate indictment for the goods found in his separate possession: See *Rex v. Barnett*, reported in 2 Russ. on Crimes, 7th Am. ed., 117.

The defendant Uprichard was convicted upon the evidence and under the instructions of the court; and the judge finding the case to involve important questions of law, with the consent of the defendant, and conformably to the provision of law in that behalf, reported the same for the consideration of this court. By the report it appears that Uprichard and Carey were soldiers in the service of the queen of England, at Sidney, in the province of Nova Scotia; that the coins alleged to be stolen were partly the property of George D. Twining, a deputy commissary at the military station in Sidney, and partly the property of the queen, in the care and control of said commissary; that the property was taken from the military chest without right, said chest being in the possession of said Twining; that the defendants deserted about the same time, with certain of said coins in their possession, and were found in this state, each having a part of the stolen property in his possession.

Upon the evidence offered, the counsel for the defendants asked the court to rule that the indictment could not be supported by the evidence: 1. Because the law in force at Sidney was not proved; 2. Because said property, if stolen at all, was stolen at Sidney, out of the state of Massachusetts, and out of the United States; and the bringing of said stolen property into, and the possession of it in, Boston would not constitute the crime of larceny in this commonwealth, and would not support the allegation that the coins and other property were feloniously stolen in this county; and therefore the court had no jurisdiction of the offense. But the court overruled the motion, and Uprichard was convicted.

This is briefly stated; but we understand, and so it has been understood in the argument, that the court instructed the jury that if the property was stolen by the defendant at Sidney, in Nova Scotia, one of the colonies and possessions of the queen of Great Britain, and the property so stolen and continuing in the possession of the defendant was brought by him into this commonwealth, and into this county, the indictment charging him with stealing them, being in possession of the owner, in this county, was legally sustained, and that the defendant could be convicted and punished for this offense by our laws.

We do not perceive that it makes any difference whether the property stolen in a foreign country was the property of the sovereign or of a subject. Indeed, it seems that a part of it was of the one character and a part of the other. Nor does it make any difference that the defendant deserted the military

service at the same time that he plundered the property of his sovereign.

This case presents an extremely interesting and important question, and the precise question, we think, comes up now for the first time in this commonwealth. The main argument in support of the conviction is founded on the well-known rule and practice of the common law, that all trials must be had in the county where the offense is committed; that when property has been proved to have been stolen in one county, and the thief is found with the stolen property in his possession in another county, he may be tried in either county. It proceeds on the legal assumption that when the property has been feloniously taken, every act of removal or change of possession by the thief may be regarded as a new taking and asportation; and as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession, and so it may be said, at each removal, to be taken from his possession: 2 Russ. on Crimes, 7th Am. ed., 115, 116. But in principle these cases are not strictly analogous. If the offense is committed anywhere within the realm of England, in whatever county, the same law is violated, the same punishment is due, the rules of evidence and of law governing every step of the proceedings are the same, and it is a mere question where the trial shall be had. But the trial, wherever had, is exactly the same, and the results are the same. A conviction or acquittal in any one county is a bar to any indictment in every other; so that the question as to the place of trial is comparatively immaterial. But even in England, a crime, being an offense against the laws of England, committed on the high seas, and not within the body of any county, cannot be tried in any county, but only in the courts of admiralty jurisdiction; and *a fortiori*, an offense committed in a foreign country by persons not there amenable to the laws of England could not, upon principle, be tried and punished in England; and the rule that when goods are feloniously taken and brought into a county, it may be charged and tried as an offense in that county, did not anciently extend to goods stolen in any place not within the common-law jurisdiction: 3 Inst. 113; 1 Hawk., c. 33, sec. 52; and a similar exception took place in regard to goods stolen in Scotland or Ireland, and brought into England, until altered by statutes 13 Geo. III., c. 31, sec. 4; and 7 & 8 Geo. IV., c. 29, sec. 76; *Rex v. Anderson*, 2 East P. C. 772; *Rex v. Prowes*, 1 Mood. C. C. 349. And the effect of these English statutes was

that where goods were stolen in one part of the United Kingdom and carried into another by the thief, or received by one knowing them so to have been stolen, the thief or receiver might be indicted and tried in that part of the United Kingdom where the goods were found. This was within the principle that in whatever part of the same government the offense was first committed, the same law was violated, the same rule and measure of punishment attached, and with the same consequences, in whatever part of the territory of the same government the trial was had. But even under the English statutes, one who steals goods in Jersey and carries them into England cannot be tried there for larceny, Jersey not being in the United Kingdom within the meaning of those statutes: *Rex v. Prowes, supra*; see also *Regina v. Madge*, 9 Car. & P. 29.

Such being the rule of the English law, we are next to inquire how it stands in this state and in the other states of the Union. In some of the states it is held that, according to the English rule in respect to counties, the carrying of stolen goods by the thief into another state from the one in which they were stolen is a new caption and a new asportation in the state into which they are thus carried. In other states a different rule is held.

In Pennsylvania it has been held that such carrying of stolen goods by the thief into another state, and possession of them there, is not larceny in the latter: *Simmons v. Commonwealth*, 5 Binn. 617. So in North Carolina and Tennessee: *State v. Brown*, 1 Hayw. 100 [1 Am. Dec. 548]; *Simpson v. State*, 4 Humph. 456; and in New York: *People v. Gardner*, 2 Johns. 477; *People v. Schenck*, Id. 479.

But a different rule has been adopted in Maryland: *Cummings v. State*, 1 Har. & J. 340; in Ohio: *Hamilton v. State*, 11 Ohio, 435; in Vermont: *State v. Mockridge*, cited in 11 Vt. 654; and in Connecticut: *State v. Ellis*, 3 Conn. 185 [8 Am. Dec. 175].

The same rule, also, that such bringing in of stolen goods is larceny, has been adopted in this commonwealth, in two cases next to be cited.

It seems to have been considered that although the several states are, in their administration of criminal law, regarded as sovereign and independent, yet, as they were originally English colonies, and acknowledged their subjection to the common law of England, and claimed its privileges, and all equally derived their principles of criminal jurisprudence mainly from that source, and as they had been, both before and since the revolution, closely united for many purposes, there was an analogy

more or less strict between the relations of these states to each other and those of counties under the same government; and therefore that the same rule might be safely adopted.

The first was the case of *Commonwealth v. Cullins*, 1 Mass. 116. The goods were stolen in Rhode Island and brought into Massachusetts. The court instructed the jury that stealing goods in one state and carrying them into another state was similar to stealing in one county and carrying them into another, and was larceny in both; and therefore, if the facts were proved, the jury would find the defendant guilty of stealing in Massachusetts. But this point was not argued. In *Commonwealth v. Andrews*, 2 Id. 14 [3 Am. Dec. 17], the defendant was convicted of receiving stolen goods, which had been stolen in New Hampshire and brought into this commonwealth; and the court held that the stealing of them was larceny in this commonwealth, and rendered the defendant answerable for receiving the goods, knowing them to be stolen. And in the same case *Dana*, C. J., mentioned the case of Paul Lord, tried in York in 1792, before the publication of reports, in which it was held that stealing goods in another state and bringing them into this was larceny in this. And that learned chief justice thought that many more cases had been determined on the same grounds. Some of the judges, however, in this case were of opinion, upon the facts stated, that there had been a second taking of the goods in this state, so as to make it actual stealing in Massachusetts.

It has then been argued that the same rule ought to apply to foreign governments as to the several states of the Union, because in their respective jurisdictions, and in the laws which regulate their internal police, these are as much foreign to each other as each state is to foreign governments. Perhaps if it were a new question in this commonwealth, this argument might have some force in leading to another decision in regard to the several American states. But supposing it to be established by these authorities, as a rule of law in this commonwealth, that goods stolen in another state and brought by the thief into this state are to be regarded technically as goods stolen in this commonwealth, we think this forms no sufficient ground for carrying the rule further, and applying it to goods stolen in a foreign territory, under the jurisdiction of an independent government, between which and our own there is no other relation than that effected by the laws of nations. Laws to punish crimes are essentially local, and limited to the boundaries of the state prescribing them. Indeed, this case, and the cases cited, proceed on the

ground that the goods were actually stolen in this state. The commission of the crime in Nova Scotia was not a violation of our law, and did not subject the offender to any punishment prescribed by our law. This indictment proceeds on that ground, and alleges the crime of larceny to have been committed in violation of the laws of this commonwealth, and within the body of this county. It is only by assuming that bringing stolen goods from a foreign country into this state makes the act larceny here that this allegation can be sustained; but this involves the necessity of going to the law in force in Nova Scotia to ascertain whether the act done there was felonious, and consequently whether the goods were stolen, so that it is by the combined operation of the force of both laws that it is made felony here. Were it any other offense than that of larceny, which gives an ambulatory character to the offense by the movable character and the guilty possession of the goods stolen, there could be no doubt of the law, and no plausible pretense that our law had been violated, or the party amenable to penalties created by it. Hence the necessity, in the constitution of the United States establishing the Union, for a fundamental clause providing for the mutual surrender of fugitives from justice, and also for treaties of extradition providing for the mutual surrender by our government of persons charged with crimes in another.

We have not overlooked the case of *State v. Bartlett*, 11 Vt. 650, in which it was held that where oxen were stolen in Canada, and by the thief brought into Vermont, the thief might be indicted and convicted, on the ground that such had been the practice. We think the case is not supported by the current of authorities, and is contrary to principle.

If this were a mere question of jurisdiction, of the place where a party should be tried, it would be substantially a technical question; but it stands on very different grounds. Here the question is one of principle, whether the defendants have violated our law. It is said that they commit a new theft by the possession of stolen goods in our jurisdiction. But what are stolen goods? Are we to look to our own law, or to the law of Nova Scotia, to determine what is a felonious taking, what is the *animus furandi*, and the like? If we look to the law of Nova Scotia, and that law is different from ours in defining and prescribing theft, then we may be called on to punish as a crime that which would be innocent here. If we look to our own law, then a taking and carrying away of goods in Nova Scotia, under circumstances which would not be criminal there, might be pun-

ishable here. Foreigners coming within our jurisdiction with goods, and complying with customary regulations, commit no offense, and commit none in removing them from place to place in the same or different counties. If they can be indicted and punished here on the ground that such goods were stolen goods when they were brought in, it is but another mode of charging that the goods were obtained by a violation of the criminal laws of another country, and our courts must necessarily take jurisdiction of the violations of the criminal laws of foreign independent governments, and punish acts as criminal here solely because they are in violation of the laws of such government, and which, but for such violation, would not be punishable here. It seems difficult to distinguish this from judicially enforcing and carrying into effect the penal laws of another government, instead of limiting our criminal jurisprudence to the execution of our own.

New trial ordered.

STEALING GOODS IN ONE STATE AND BRINGING THEM INTO ANOTHER CONSTITUTES LARCENY IN LATTER, WHEN: See *Hemmaker v. State*, 51 Am. Dec. 172, and note citing cases 174. The principal case is cited to this point in *Commonwealth v. Holder*, 9 Gray, 7, to sustain the proposition that such act does constitute larceny in Massachusetts, Thomas, J., dissenting, and also citing the principal case to support the contrary doctrine: Id. 11, 14, 15. The principal case is also cited to this point in *Commonwealth v. White*, 123 Mass. 433. In *Commonwealth v. Macloon*, 101 Id. 5, in citing the principal case, the court say that stealing goods on the high seas and bringing them into Massachusetts does not constitute larceny.

HISS v. BARTLETT.

[3 GRAY. 468.]

HOUSE OF REPRESENTATIVES OF MASSACHUSETTS HAVE POWER TO EXPEL MEMBER, and on such expulsion his privilege from arrest on mesne process ceases; and a court, in determining whether he was so privileged, cannot inquire into the reasons for expulsion, nor the question whether the member was duly heard before being expelled.

HABEAS CORPUS issued on a petition representing that the prisoner was a member of the house of representatives, and as such exempt from arrest on mesne process while in attendance on the general court; and that the arrest, by virtue of a writ of *capias* and attachment while attending such court, under which he is now held, is unlawful. The creditors, at whose suit the arrest was made, answered, denying that petitioner was a member of the house of representatives. On the hearing, it was

proved that after investigation by a committee appointed therefor they had recommended his expulsion from the house on the ground of improper and disgraceful conduct, and that the house thereupon, without giving him an opportunity to be fully heard by counsel, expelled him.

B. F. Butler and B. Dean, for the petitioner.

J. H. Buckingham, for the respondent.

By Court, SHAW, C. J. This case arises upon the privilege of a representative to be exempted from arrest on a mesne process, going to, or returning from, or attending the general court: Const. Mass., c. 1, sec. 3, art. 10

Can this be inquired into by *habeas corpus?* I think it can. It is a question of personal privilege, not of the privilege of the house. If it were, it might be more questionable: *Wilkes's Case*, 19 Howell's State Trials, 981; *Holiday v. Pitt*, 2 Stra. 985.

The question is whether the house of representatives have the power to expel a member. The only clause in the constitution which can have a bearing on this question is as follows: "The house of representatives shall be judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution, shall choose their own speaker, appoint their own officers, and settle the rules and orders of proceedings in their own house. They shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who in the town where the general court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members for anything said or done in the house; or who shall assault any of them therefor; or who shall assault or arrest any witness or other person ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house:" Const. Mass., c. 1, sec. 3, art. 10. The authority to be "judge of the returns, elections, and qualifications of its own members" does not limit their power; they are judges in other respects, in all respects.

They "shall settle the rules and orders of proceeding." It is said they had made no rule on the subject previously. I doubt whether that is necessary. They cannot enlarge their own powers by a rule. Why may they not make a particular rule when the exigency arises? The more obvious purpose of this clause was, no doubt, to give an authority to make general rules. But a

case may arise unforeseen, for which no rule had been previously prescribed. I am rather inclined to think that this clause gives the power.

But if not, the omission of an authority to punish members, when that of punishing persons not members is so distinctly given, may well have been made because their implied power over their own members was full and complete, though an express grant of power was necessary in regard to persons not members. The maxim, *Expressio unius exclusio est alterius*, does not apply except where the two cases are alike.

There is a marked difference between the power of punishment and the power of expulsion. If not punishment, then the twelfth and twenty-fourth articles of the declaration of rights, as to trial by peers and opportunity to defend, and the injustice of punishing acts not declared crimes by preceding laws, do not apply. The power to expel implies the power to try; and if by the constitution they have the power to expel, the power to try is expressly given them by chapter 1, section 3, article 11. There is nothing to show that the framers of the constitution intended to withhold this power. It may have been given expressly in other states, either *ex majori cautela*, or for the purpose of limiting it, by requiring a vote of more than a majority.

It is suggested that the true remedy is by impeachment. But that form of proceeding has never been applied to members of the legislature; and would be slow, laborious, and expensive, and inadequate to the object sought to be attained. Impeachment lies only for purposes of punishment, by deprivation of office and disqualification to hold office, leaving the offender still liable to indictment, if the offense be indictable. The power of expulsion is a necessary and incidental power to enable the house to perform its high functions, and is necessary to the safety of the state. It is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be afflicted with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language. It is necessary to put extreme cases to test a principle. If the power exists, the house must necessarily be the sole judge of the exigency which may justify and require its exercise.

As to the law and custom of parliament, the authorities cited clearly show that the jurisdiction to commit and also to expel has long been recognized, not only in parliament, but in the courts of law for the purposes of protection and punishment. I here confine myself strictly to the law of personal privilege

from arrest. There has been much debate upon abuse of power and excess of claim of privilege; but the power to commit or expel is uniformly admitted. The whole subject of privilege is much discussed in *Thompson's Case*, 8 Howell's State Trials, 1, and note. Formerly it required a writ of privilege to discharge from arrest; but the practice now is to discharge on motion: *Holiday v. Pitt*, 2 Stra. 985; *Crooby's Case*, 19 Howell's State Trials, 1150. But to look at the more recent cases upon the question of jurisdiction, some of which were cited by the counsel for the prisoner. The case of *Burdett v. Abbot*, 14 East, 1, was an action of trespass by Sir Francis Burdett, a member of the house of commons, against the speaker of the house, for breaking and entering his dwelling-house and carrying him to the tower. The speaker justified under the order of the house for the commitment of the plaintiff for contempt for libels published by him injurious to the house; and it was held a good justification. An elaborate judgment was given by Lord Ellenborough, fully recognizing the power of the house of commons to commit one of its own members for breach of its privilege by publishing libels. This decision was affirmed on error in the exchequer chamber: 4 Taunt. 401.

The next is the well-known case of *Stockdale v. Hansard*, 7 Car. & P. 781; S. C., 9 Ad. & El. 1; 11 Id. 258, 297; *Case of Sheriff of Middlesex*, Id. 278, which led to a sharp contest between the house of commons and the king's courts. The controversy was ultimately settled in 1840 by statute 3 Vict., c. 9. The question was whether the publication of matter, which would otherwise be libelous against an individual, could be justified under an order of the house of commons; and the courts of law held it no justification. That was a civil action. Many of the remarks of the judges intimate what are the privileges of the house of commons. Coleridge, J., said: "No one in the least degree acquainted with the constitution of the country will doubt that in one sense the house is alone to judge of its own privileges—that in the case of a recognized privilege the house alone can judge whether it has been infringed, and how the breach is to be punished:" *Stockdale v. Hansard*, 9 Ad. & El. 218. If the house of commons have the power to commit, it appears to me, *a fortiori*, that they have the power to expel.

But it is suggested that although the constitution, chapter 6, article 6, provides that all the laws which have heretofore been adopted, used, and approved, and usually practiced on in the courts of law, shall still remain in full force, until altered or repealed by the legislature; this does not extend to the laws and

customs of parliament. This conclusion may perhaps admit of some doubt. For a long time, it was maintained by those who favored privilege and prerogative that these were not inquirable into in the common-law courts; and the great struggle in modern times has been to bring these privileges within the cognizance of courts of law, especially when occasion arises to inquire into them collaterally.

But there is another consideration which seems to render it proper to look into the law and practice of parliament to some extent. I am strongly inclined to believe, as above intimated, that the power to commit and to expel its members was not given to the house and senate respectively, because it was regarded as inherent, incidental, and necessary, and must exist in every aggregate and deliberative body, in order to the exercise of its functions, and because without it such body would be powerless to accomplish the purposes of its constitution; and therefore any attempt to express or define it would impair rather than strengthen it. This being so, the practice and usage of other legislative bodies exercising the same functions, under similar exigencies, and the reasons and grounds existing in the nature of things upon which their rules and practice have been founded, may serve as an example, and as some guide to the adoption of good rules, when the exigencies arise under our constitution.

But independently of parliamentary custom and usages, our legislative houses have the power to protect themselves by the punishment and expulsion of a member. It is urged that this court will inquire whether the petitioner has been tried. But if the house have the jurisdiction for any cause to expel, and a court of justice finds that they have in fact expelled, I think we are bound to say that when he was arrested he was not a member of the house of representatives, and his privilege from arrest was at an end.

Prisoner remanded.

POWER OF LEGISLATIVE BODY TO EXPEL MEMBER.—This has been a subject of very limited judicial consideration, for the reason that this power has generally been expressly granted to such bodies at their creation. But from the reasoning of the principal case, legislative bodies have, independent of express grant or of parliamentary usage, the power to protect themselves by punishment and expulsion of a member: Cooley on Const. Lim., 5th ed., 160. The United States constitution gives to each house of congress the power to expel a member on the concurrence of two thirds of all members elected: Art. I, sec. 5. This clause has not been judicially construed, but in Story's Const. Law, sec. 838, the author asserts that under such a clause the body itself

could properly determine for what causes an expulsion might be voted, and that an offense, though not punishable by any statute, if inconsistent with a member's duty and trust, might be a good cause therefor. In *Marshall's Case*, U. S. Sen. Jour., March 22, 1796, also cited in Serg. Const. Law, 300, the Kentucky legislature charged a United States senator from that state with perjury, and requested the United States senate to expel him. The senate held that in such a case they had no jurisdiction to expel him unless he had been duly convicted of such crime, on an indictment by a grand jury. In *John Smith's Case*, the United States senate, on the report of a committee, held that it had jurisdiction to expel a member for conspiracy to commit treason, though an act not done in its presence; that a previous judicial conviction was not a prerequisite to jurisdiction by the senate (commenting on *Marshall's Case, supra*); and that in such a case the senate was not bound by judicial forms of proceeding and rules of judicial evidence: See U. S. Sen. Jour., Dec. 31, 1807; also cited in Serg. Const. Law, 302; S. C., 1 Hall L. J. 465. The United States senate, in another case, expelled a member for high misdemeanor, in attempting to seduce from his duty a United States Indian agent: *Blount's Case*, U. S. Sen. Jour., July 8, 1797; cited in Serg. Const. Law, 301; S. C., 1 Hall L. J. 459. By the constitutions of all of the United States except Kansas, Massachusetts, New Hampshire, New York, North Carolina, and Virginia, express power is granted to the legislatures to expel members. The principal case is authority for the existence of the power under the provisions of the Massachusetts constitution, though not expressly granted. In Alabama the provision of the constitution simply is that the legislature may expel members; in California, Connecticut, Delaware, Florida, Georgia, Nevada, and New Jersey, that the concurrence of two thirds of all members is necessary to expulsion; in all other states the provision is that a member may be expelled with the concurrence of two thirds of all members, but not a second time for the same offense, nor for an offense known at the time of election.

MUNICIPAL CORPORATIONS, RIGHT OF COMMON COUNCIL TO EXPEL MEMBER.—The question not being settled by judicial decision, in the absence thereof it seems that the common council of the ordinary municipal corporation has power, incidentally, to expel members for cause: 1 Dillon on Mun. Corp., 3d ed., sec. 242. Where the common council had by its charter power to expel a member for disorderly conduct, it was held that receiving bribes for his official influence and votes was disorderly conduct for which he might be expelled, but that such expulsion did not disqualify him from re-election: *State v. Jersey City*, 1 Dutch. 536.

CORPORATIONS AND UNINCORPORATED SOCIETIES, POWERS OF DISFRANCHISEMENT AND EXPULSION OF MEMBERS.—The power to disfranchise or expel members is incident to every corporation or society, except where formed primarily or exclusively for the purpose of gain, when such power cannot be exercised unless granted by charter: *In re Long Island R. R. Co.*, 19 Wend. 37; *Evans v. Philadelphia Club*, 50 Pa. St. 107; or where the corporation or society owns property, in which case a member cannot be expelled or deprived of his interest in the stock and general fund unless such power has been expressly conferred by charter: *Bagg's Case*, 11 Co. 99; *Davis v. Bank of England*, 2 Bing. 393; *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq., 63; *State v. Tudor*, 5 Day, 329; *Roehler v. Mechanics' Aid Society*, 22 Mich. 86; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Society v. Commonwealth*, 58 Id. 125.

Corporations.—Where the body is expressly authorized to expel for reasonable cause or for the commission of particular offenses, what constitutes such cause or offense is a matter solely for corporation to determine: *Inderwick v. Snell*, 2 Mass. & G. 216; *Commonwealth v. Pike Beneficial Society*, 8 Watts & S. 247; *Black and White Smiths' Society v. Van Dyke*, 30 Am. Dec. 263; subject, however, to review by the courts, where arbitrary action or *mala fides* is shown: *Regina v. Governors of Darlington Free School*, 14 L. J. Q. B. 67; *People v. Higgins*, 15 Ill. 110. Where there is no express grant of power, corporations by virtue of their implied and inherent power may disfranchise or expel: 1. For offenses having no immediate relation to a member's corporate duty, but of so infamous a nature as to render him unfit for the society of honest men; 2. For offenses against the member's duty as a corporator; 3. For offenses compounded of the two: *Rex v. Richardson*, 1 Burr. 539; *People v. Board of Trade*, 45 Ill. 112; *People v. New York Com. Ass'n*, 18 Abb. Pr. 271; *People v. Fire Underwriters*, 7 Hun, 248; *People v. Medical Society*, 24 Barb. 570; *Fawcett v. Charles*, 13 Wend. 473; *Commonwealth v. St. Patrick's Beneficial Society*, 4 Am. Dec. 453; *Leech v. Harris*, 2 Brewst. 571; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Smith v. Smith*, 3 Desau. 557; *State v. Chamber of Commerce*, 20 Wn. 63; *State v. Kuehn*, 34 Id. 229. The right to remove for improper conduct, as being incident to a corporation, is well settled: *Smith v. Smith*, 3 Desau. 557; but where the corporator's offense is of an infamous nature, so as to render him unfit for association with honest men, it has been held that an indictment and conviction by a jury was a necessary prerequisite to expulsion: *Leech v. Harris*, 2 Brewst. 571; *Commonwealth v. St. Patrick's Beneficial Society*, 4 Am. Dec. 453; *Commonwealth v. Guardians of the Poor*, 6 Serg. & R. 469. Courts will consider, where the offense for which a member is expelled is breach of his duty as a corporator, whether the offense amounted to an injury to the corporation, and relief will be regulated accordingly: *Fawcett v. Charles*, 13 Wend. 473; *People v. St. Stephen's Church*, 53 N. Y. 103; *People v. New York Cotton Exchange*, 8 Hun, 216; *Commonwealth v. Philanthropic Society*, 5 Binn. 216; *Commonwealth v. Guardians of the Poor*, 6 Serg. & R. 469; *Ex parte Paine*, 1 Hill (N. Y.), 635. Where the offense consists in the breach of a by-law, the by-law must be at least reasonable in its nature: *People v. Medical Society*, 24 Barb. 570; *Hibernia Fire Ins. Co. v. Commonwealth*, 93 Pa. St. 264; and see *Dawkins v. Antrobus*, L. R., 17 Ch. Div., 615, applying the rule to unincorporated societies; the by-law itself must not be opposed to public policy: *People v. Medical Society*, 24 Barb. 570; *People v. N. Y. Benevolent Society*, 3 Hun, 361; and though the by-law be valid, and the offense within it, yet if not deemed injurious to the corporation, the expulsion will not be sustained: *Evans v. Philadelphia Club*, 50 Pa. St. 107; *People v. Mechanics' Aid Society*, 22 Mich. 86.

The question of disfranchisement or expulsion of a member of a corporation has often been before the courts, and the following comprise the substance of particular instances in which the validity of the action of the corporation has been sustained or denied: In England, defect in original qualification for membership has been held to constitute good cause for disfranchisement: *Regina v. Saddler's Co.*, 10 H. L. Cas. 404; in United States, the contrary has been held to be the law: *Fawcett v. Charles*, 13 Wend. 473. Deviation from rules or by-laws prior to membership is no ground for disfranchisement: *People v. Medical Society*, 32 N. Y. 187. Expulsion for non-compliance with minor and unimportant regulations is void if the offense produce no injury: *Evans v. Philadelphia Club*, 50 Pa. St. 107. Member of trade association was properly expelled for failure to comply with the terms of his contract;

People v. Board of Trade, 45 Ill. 112; *Dickinson v. Chamber of Commerce*, 29 Wis. 45; for obtaining goods under false pretenses: *People v. New York Com. Ass'n*, 18 Abb. Pr. 271; for carrying on business at times and places prohibited by the association: *State v. Chamber of Commerce*, 47 Wis. 670; or where member of a board of fire underwriters charged lower rates than those fixed by the association, though not made a cause of expulsion by the by-laws: *People v. New York Board of Fire Underwriters*, 7 Hun, 248; but it has been held that such an association cannot legally expel a member for failure or refusal to submit a dispute to arbitration where he has once brought suit on it: *State v. Chamber of Commerce*, 20 Wis. 63; nor for refusal to pay an award, where the member was entitled to an appeal to the whole body, which was denied him: *Savannah Cotton Exchange v. State*, 54 Ga. 668; nor for sale of a seat in a board of trade, to which the managers had declared the member's title invalid: *People v. New York Cotton Exchange*, 8 Hun, 216. Expulsion from a medical society was held valid where the cause assigned was the selling out of a practice, and then resuming practice in the same neighborhood, to the injury of the vendee: *Barrows v. Medical Society*, 12 Cush. 402; or where the person expelled, a physician, held himself ready to practice as an allopath or homeopath, at the inclination of the patient: *Ex parte Paine*, 1 Hill (N. Y.), 665; but the expulsion was not sustained where made, because of presentation of a diploma which did not entitle the party to membership under the society's regulations: *Fawcett v. Charles*, 13 Wend. 73; or for receiving a less fee than that prescribed by the by-laws: *People v. Medical Society*, 24 Barb. 270; or advertising patent medicine or instruments: *People v. Medical Society*, 32 N. Y. 187. Becoming surety on a colored person's bond during the war is not such a departure from a physician's duty, as such, that he may be expelled from a medical society therefor: *State v. Georgia Medical Society*, 38 Ga. 608. A member of a mutual benefit association may be expelled for altering a certificate so as to entitle him to greater aid than due him: *Commonwealth v. Philanthropic Society*, 5 Binn. 486; or for failure to pay dues: *Hussey v. Gallagher*, 61 Ga. 86; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 284; contra: *People v. Fire Department*, 31 Mich. 458; but failure to pay dues after illegal suspension is not cause for expulsion: *People v. New York Beneficial Society*, 3 Hun, 361; nor where a member has been fined for an offense can he be expelled for the same cause: Id. Feigning sickness to obtain aid is good cause for expulsion: *Society for Visitation of Sick v. Commonwealth*, 52 Pa. St. 125. Where the by-laws make it a cause, expulsion for enlisting as a soldier for active service will be legal: *Franklin Beneficial Ass'n v. Commonwealth*, 10 Id. 357. A trustee may be expelled for charging a corporation with money which he has never paid: *Commonwealth v. Guardians of the Poor*, 6 Serg. & R. 469. A member of the faculty of an educational institution may be expelled for neglect of duty: *Murdock's Case*, 7 Pick. 303; but not for settled difference as to mode of instruction: Id. A trustee may be expelled for disrepect to his associates, or for failure to perform his official duties: *Fuller v. Plainfield Academy School*, 6 Conn. 532. Where the charter of a religious corporation makes no provision therefor, it cannot expel for moral delinquency: *People v. St. Stephen's Church*, 53 N. Y. 103. A purely secular body cannot expel a member for refusal to take a sacrament according to the form of a religious sect: *People v. St. Francis' Beneficial Society*, 24 How. Pr. 216. It has been held that an offense of one member against another is not cause for expulsion, as the case of one member vilifying another: *Commonwealth v. St. Patrick's Beneficial Society*, 4 Am. Dec. 453; or of one of the members striking another: *Evans v. Philadelphia Club*, 50 Pa. St. 107; but this question is not settled, the latter of the above cases being decided by a divided court.

Unincorporated Societies.—A clear distinction is recognized between the power of corporations and that of non-incorporated societies to expel members. Where a corporation expels a member, whether by virtue of express power under its charter, in pursuance of its by-laws, or through the inherent power attaching to it, the courts will, at the instance of the expelled member, investigate the action of the corporation; determine whether it acted in accordance with its power; whether the by-laws were legal and reasonable; whether the expulsion was fair and just; and whether the cause of expulsion was such as would produce an injury to the corporation. But in the case of expulsion by an unincorporated society, courts will not interfere with the decision of members of the society where they profess to act under their rules, unless it can be shown either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been *mala fides*, or malice, in arriving at the decision: *Douglas v. Antrobus*, L. R., 17 Ch. Div., 615; *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq., 63; *Labouchere v. Earl of Wharncliffe*, L. R., 13 Ch. Div., 348; *White v. Brownell*, 2 Daly, 329. In Illinois and Maryland, however, it has been held that corporations, as regards their powers of expulsion, stand on the same footing as unincorporated societies, and are left to enforce their rules and by-laws subject to the limitation as above stated for unincorporated societies: *People v. Board of Trade*, 80 Ill. 134, overruling *People v. Board of Trade*, 45 Id. 112; *Anacosta Tribe of Red Men v. Murbach*, 13 Md. 91. The Illinois law, however, is not settled: See *Baxter v. Board of Trade*, 83 Ill. 147; *Sterges v. Board of Trade*, 86 Id. 441. Unincorporated societies may make such rules as they please in regard to expulsion: *Innes v. Wylie*, 1 Car. & Kir. 257; *Bliss v. Daniel*, 10 Hare, 493; and members are bound by them when not in conflict with the general municipal law: *White v. Brownell*, 2 Daly, 329; S. C., 3 Abb. Pr. N. S., 318; 4 Id. 162; *State v. Williams*, 75 N. C. 134; whether they are reasonable or not: *Elias v. Alford*, 1 City H. Rec. 123. A ceremony of expulsion which involves a battery on the member is contrary to express law, and even the refusal of the member to submit, it constitutes an unlawful act if enforced, and renders the person committing the battery personally liable: *State v. Williams*, 75 N. C. 134. Where the rules so provide, an expulsion is valid where the cause is default in the performance of contracts: *White v. Brownell*, 2 Daly, 329; insolvency of the member: *Moxey's Appeal*, 9 Weak. Notes Cas. 441; moral delinquency: *People v. St. Stephen's Church*, 53 N. Y. 103; the use of menacing language to another member: *Innes v. Wylie*, 1 Car. & Kir. 257; slander of the society and its members: *People v. Mechanics' Aid Society*, 22 Mich. 86; or the publication of a libelous pamphlet on another member of the club: *Dasokine v. Antrobus*, L. R., 17 Ch. Div., 615. Jessel, J., in this last case said that if the club had been incorporated, this would not have been good cause, but James, J., thought *contra*.

Manner of Exercising Power.—Where a rule or method of expulsion is provided, it must be strictly followed, or the expulsion will be void: *Fisher v. Keane*, L. R., 11 Ch. Div., 353; *Labouchere v. Earl of Wharncliffe*, 13 Id. 346; *Commonwealth v. Guardians of the Poor*, 6 Serg. & R. 469; *Commonwealth v. Pike Beneficial Society*, 8 Watts & S. 247; *Washington Beneficial Society v. Backer*, 20 Pa. St. 425; *Society for Visitation of Sick v. Commonwealth*, 52 Id. 25. Where no method is provided by charter or constitution, by-laws for that purpose may be adopted: *State v. Trustees Vincennes University*, 5 Ind. 77; *People v. American Institute*, 44 How. Pr. 468; *Commonwealth v. German Society*, 15 Pa. St. 251. The courts construe the true meaning of by-laws: *People v. New York Com. Ass'n*, 18 Abb. Pr. 271; *Franklin Beneficial Society v. Commonwealth*, 10 Pa. St. 357; *State v. Chamber of Commerce*, 20 Wis.

63; *Dickenson v. Chamber of Commerce*, 29 Id. 45; and determine whether specific acts come within their meaning as causes for disfranchisement: *State v. Georgia Medical Society*, 33 Ga. 608. The power of disfranchisement is originally in the whole body: *Weber v. Zimmerman*, 22 Md. 156. Some cases hold that the power may be delegated to a committee or select body: *Hussey v. Gallagher*, 61 Ga. 86; *People v. Board of Trade*, 45 Ill. 112; *People v. Fire Department*, 31 Mich. 458; *People v. New York Com. Ass'n*, 18 Abb. Pr. 271; *White v. Brownell*, 2 Daly, 329; *Green v. African M. E. Society*, 1 Serg. & R. 254; while other cases declare that the power cannot be reposed in such select body unless so provided by charter or constitution: *State v. Chamber of Commerce*, 20 Wia. 63; *State v. Chamber of Commerce*, 47 Id. 670; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264. Where no express method is provided for expulsion, a member cannot be deprived of his franchise without notice and a chance to be heard: *Fisher v. Keane*, L. R., 11 Ch. Div., 353; *Wachtel v. Noah Widow's and O. B. Society*, 84 N. Y. 25; *Commonwealth v. Pennsylvania Beneficial Society*, 2 Serg. & R. 141; *Commonwealth v. German Society*, 15 Pa. St. 251; *Diligent Fire Engine Co. v. Commonwealth*, 75 Id. 291. An express grant of power to expel does not obviate the necessity of notice, and an opportunity to the member to be heard: *Delacy v. Neuse River Nav. Co.*, 1 Hawks, 278; S. C., 9 Am. Dec. 636. By-laws authorizing expulsion without notice are void: *People v. Fire Department*, 31 Mich. 458. Mere posting in the corporate premises is not a sufficient notice: *Sibley v. Carteret Club*, 40 N. J. L. 295. Service of notice is not excused by change of residence: *Wachtel v. Noah Widow's and O. B. Society*, 84 N. Y. 28; *Harmstead v. Washington Fire Co.*, 8 Phila. 331. The notice must be a personal one: *Wachtel v. Noah Widow's and O. B. Society*, 84 N. Y. 28; and must contain a statement of the charges against the member: *Murdock's Case*, 7 Pick. 303; *Murdock v. Phillips Academy*, 12 Id. 244. Appearance without notice dispenses with the necessity therefor: *Commonwealth v. Pennsylvania Beneficial Society*, 2 Serg. & R. 141; and an admission of the charge is a plea of guilty, upon which the member is not entitled to a hearing: *Mohey's Appeal*, 9 Week. Notes Cas. 441. "Hearing" means a right to counsel, and a chance to question evidence: *Murdock v. Phillips Academy*, 12 Pick. 244. Expulsion on purely *ex parte* evidence will be set aside: *Fisher v. Keane*, L. R., 11 Ch. Div., 353; *Labouchere v. Earl of Wharncliffe*, L. R., 13 Ch. Div., 346; *Sleeper v. Franklin Lyceum*, 7 R. I. 523. The trial must be fair and open: *State v. Adams*, 44 Mo. 570; and the trying body unprejudiced: *Smith v. Nelson*, 18 Vt. 511.

To justify courts to interfere in the matter of expulsion, a clear case of injustice must be shown: *People v. St. George's Society*, 28 Mich. 261. Injunctions will be allowed in proper cases to restrain unlawful expulsion for alleged violation of rules: *Olery v. Brown*, 51 How. Pr. 92; *Leech v. Harris*, 2 Brewst. 571; but see, *contra*, *Gregg v. Massachusetts Medical Society*, 111 Mass. 185; *Sturges v. Board of Trade*, 86 Ill. 441; *Fisher v. Board of Trade*, 80 Id. 85; *Baxter v. Board of Trade*, 83 Id. 147. Where a member has been illegally expelled, *mandamus* is the proper remedy to restore him to his franchise: *Evans v. Philadelphia Club*, 50 Pa. St. 107; *People v. Beneficial Society*, 24 How. Pr. 216; *State v. Lipa*, 28 Ohio St. 665; *People v. Board of Trade*, 45 Ill. 112; *Sibley v. Carteret Club*, 40 N. J. L. 295; *Delacy v. Neuse Rive. Nav. Co.*, 9 Am. Dec. 636; see, *contra*, *Cook v. College of Physicians*, 9 Bush, 542. *Mandamus* will be refused where relief may be had by other means: *Harrison v. Simonds*, 44 Conn. 318; *Black and White Smiths' Society v. Vandyke*, 30 Am. Dec. 263, and note 265.

THE PRINCIPAL CASE IS CITED in *People v. Hall*, 80 N. Y. 126, to the point that power in a charter to a corporation to judge of the qualifications of its own members does not oust the courts of jurisdiction to originate an inquiry as to the right to office in the governing board of such corporation.

PETTEE v. PROUT.

[2 GRAY, 502.]

Possession is Prima Facie Evidence of Title to Note made payable to person named, or bearer, in an action by a person who is not the payee named, but is the general agent of the payee who is alleged in the answer to be the owner of the note.

Bearer of Note Payable to Payee Named or Bearer, who takes it before maturity, holds it free from any equities or set off the maker may have against the payee named.

Action by plaintiff, as bearer of a note made by the defendant to the Cheshire Iron Works or bearer. Defendant denied the plaintiff was the owner or bearer of the note, and also filed a declaration in set-off on a note by the Cheshire Iron Works to defendant. The further facts appear in the opinion.

J. D. Colt, for the plaintiff.

J. C. Wolcott, for the defendant.

By Court, SHAW, C. J. The plaintiff brings his action as bearer of a note made by the defendant to the Cheshire Iron Works or bearer. He therefore claims as the holder of a negotiable promissory note, payable on time, and not dishonored; and if he establishes this title by proof, he is entitled to the same privileges and immunities as an indorsee having taken a note by indorsement in the course of business before it has become due. He is not subject to any equities as between the promisor and the original payee, nor to the set-off of any debt, legal or equitable, which the promisor may afterwards acquire: *Wheeler v. Guild*, 20 Pick. 545. By giving a note payable to bearer at a future day, which is strictly a negotiable note, the defendant agreed to pay the amount to any person, to whom it should be transferred, before the day of payment, without claiming to set off any demand, which he then had or might have against the promisee. It is in this respect like mercantile notes (in use, we believe, in some of the states where the law allows set-offs and other equitable defenses, even against indorsees of promissory notes), payable "without defalcation" thereby meaning by force of the contract itself to bind the

maker to pay the amount absolutely to the regular holder, and renouncing any benefit of set-off or other equitable defense against the payee.

Then the question is as to the proof. Where a plaintiff brings the note declared upon in his hand, and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner; and this will stand a proof of title until other evidence is produced to control it. Ordinarily such bearer, relying on the general presumption, has no means of proving the transfer of the note to himself. The defendant contends that as the plaintiff was the general agent of the corporation to whom the note was payable, and as such had the custody of all their notes, his possession may have been the possession of the corporation. But we think this fact alone is not sufficient to rebut the general presumption.

The demand relied on by the defendant is a note signed by the Cheshire Iron Works, payees of the note in suit, and payable to order; still it was not negotiable, because payable in part in goods. A negotiable note must be payable in money. But though the defendant could not sue on this note in his own name, yet we believe by the revised statutes, chapter 96, section 5, as the assignee of a chose in action, the holder of such note might use it as a set-off, in a proper case, as against a suit brought by the debtor, in the same manner as if it were a legal debt. But it is unnecessary further to remark on the validity of the set-off; the ground of our decision is, that the plaintiff held the note in suit under such a title, that no demand of the defendant, legal or equitable, against the Cheshire Iron Works, could avail him as a set-off.

Judgment for the plaintiff.

Possession is PRIMA FACIE EVIDENCE OF TITLE TO NOTE PAYABLE TO BEARER: See *Morgan v. Yarborough*, 23 Am. Dec. 554, note; *Eddy v. Bond*, 26 Id. 767; *Whiteford v. Burckmeyer*, 39 Id. 640, and cases in note 657; *Way v. Richardson*, ante, p. 760. The principal case is cited to this point in *Andrews v. Lyon*, 11 Allen, 350; *Hoscom v. Beach*, 112 Mass. 450. In *Smith v. Sec. County*, 11 Wall. 350, and *Railroad Company v. National Bank*, 102 U. S. 26, the court, in approving the principal case, say that if plaintiff, in an action on such a note, prove the signatures and introduce the note, it goes to the jury clothed with the presumption that he is a holder for value, and took it without notice of any existing equities affecting it.

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2. **ASSIGNEE OF UNNEGOTIABLE DEBT SHOULD GIVE NOTICE** of the assignment to the garnishee, summoned as the debtor of the principal debtor, in time to enable him to show such assignment in his answer, or at least before judgment against him. If, having such notice, he neglects to show it in defense, he cannot resist a subsequent claim by the assignee; but if he does show it, he cannot be charged as garnishee. *Walters v. Washington Ins. Co.*, 451.
3. **WHERE ASSIGNEE OF UNNEGOTIABLE INSTRUMENT FAILS TO GIVE NOTICE** of the assignment to the debtor until after judgment of garnishment for the debt has been rendered against him, the garnishee is relieved from liability to the assignee. *Id.*
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1. **ASSIGNMENT FOR BENEFIT OF CREDITORS, WITH CONDITIONS OF RELEASE,** will not be upheld in Georgia. *Miller v. Conklin & Co.*, 248.
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ATTACHMENTS.

1. **CREDITOR CANNOT ALWAYS ATTACH CLAIM BECAUSE CLAIMANT MAY SUR,** although the general rule is that he can do so. *Mayor and City Council of Baltimore v. Root*, 692.
2. **GARNISHEE'S RIGHTS SHOULD BE CAREFULLY PROTECTED.** He is to be charged only upon his contract, or relation with his creditor, precisely as it exists between them, and is in no case to be placed in a situation where he will be compelled to pay the debt twice, or where he will be unnecessarily exposed to litigation and expense. *Walters v. Washington Ins. Co.*, 451.

2. **PRIMARILY, GARNISHEE IS REGARDED AS INNOCENT PERSON owing money to or having in his possession property of another, without fault or blame, and he is supposed to stand indifferent as to who shall have the money or property.** *Id.*
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 8. **BY STATUTE OF IOWA, ISSUE MAY BE TAKEN ON ANSWER OF GARNISHEE,** but if such issue is not taken, his answer is the sole test of his indebtedness or liability. *Walters v. Washington Ins. Co.*, 451.
- See ASSIGNMENTS, 3; PLEADING AND PRACTICE, 15; REPLEVIN, 1; SHERIFFS, 3; TRESPASS, 1.**

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- 1. DEFENDANT'S DISCHARGE UNDER INSOLVENT LAWS DOES NOT NECESSARILY SHOW WANT OF JURISDICTION** on the part of a justice of the peace to render a judgment against him for a cause of action that accrued prior to his application for the benefit of such laws. *Deal v. Harris*, 686.
- 2. BONA FIDE MORTGAGE OF HIS PROPERTY MADE BY INSOLVENT DEBTOR**, in ignorance of his insolvency, not with the intention of closing his business, but with a view of continuing and extending it, is not made "in view of insolvency," within the meaning of the insolvent act. *Utley v. Smith*, 163.
- 3. WORDS "FAILING CIRCUMSTANCES," USED IN CONNECTICUT INSOLVENT ACT OF 1853**, are to be construed to mean the closing of business by an avowed and deliberate failure. *Id.*

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

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- 1. BANK HAS POWER TO DISCHARGE DEBT AND MORTGAGE, AND TAKE ANOTHER IN PAYMENT**, under an act which provides that it shall not exercise the usual banking powers, but shall "confine all its operations to winding up its affairs, collecting and securing its debts, paying the debts of the bank, selling its real and personal estate," etc. *Ryan v. Dunlap*, 334.
- 2. CASHIER OF BANK MAY RELEASE DEBT AND MORTGAGE DUE BANK** by virtue of his general authority and the custom and practice of the bank. *Id.*
- 3. PROTESTS OF INLAND BILLS AND PROMISSORY NOTES ARE MADE PRIMA FACIE EVIDENCE** by the Maryland act of 1837, chapter 253, and it is the duty of banks receiving such instruments for collection to place them in the hands of a notary, that they may be protested in due time, when necessary. *Citizens Bank of Baltimore v. Howell*, 714.
- 4. BANK IS NOT ANSWERABLE FOR LOSS RESULTING FROM FAILURE OF NOTARY** to perform his duty, where it receives for collection a note or bill, in the ordinary course of business, without any special agreement on the subject, and in due time delivers it to the notary usually employed by it in such matters, so that the necessary demand, protest, and notices may be made and given. *Id.*
- 5. IF OVERDRAFT HAS BEEN PAID BY CASHIER OF BANK IT CAN BE RECOVERED BACK BY BANK** from the individual thus overdrawing. *Franklin Bank v. Byram*, 643.
- 6. PAYMENT UPON OVERDRAFTS IS NOT LOAN, WITHIN MEANING OF STATUTE** which forbids any bank to make any discounts without at least two responsible names as principals, sureties, or indorsers. *Id.*

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1. FERRY-MEN ARE COMMON CARRIERS. *May v. Hanson*, 135.
2. COMMON CARRIERS OF PASSENGERS ARE NOT INSURERS AGAINST ALL ACCIDENTS. *Galena & Chicago Union R. R. Co. v. Fay*, 323.
3. FERRY-MAN BECOMES LIABLE FOR PASSENGER'S SAFE TRANSPORT AND DELIVERY as soon as he signifies his assent or readiness to receive the passenger, and is chargeable with any accident occurring except by act of God or the public enemy. *May v. Hanson*, 135.
4. CHARGE TO JURY THAT COMMON CARRIERS OF PASSENGERS ARE ONLY LIABLE for the want of such care, diligence, and skill as is characteristic of cautious persons is too narrow, and does not express their full degree of liability as such carriers. The care and diligence of "cautious" persons is too indefinite and uncertain a form of expression to be used in a charge to the jury. *Galena & Chicago Union R. R. Co. v. Fay*, 323.
5. PASSENGER ON RAILROAD CAR, WHOSE CARELESSNESS OR IMPRUDENCE CONTRIBUTES in any way to produce the injury complained of, cannot recover therefor. *Id.*
6. WHERE PASSENGER'S WANT OF CARE CONCOURS WITH NEGLIGENCE OF RAILROAD COMPANY in producing an injury to the former, he cannot recover for it. *Id.*
7. RAILROAD COMPANY MAY SHOW THAT INJURY TO PASSENGER IN LEAVING FROM CAR was the result of his carelessness or culpable negligence prior to the accident. *Id.*
8. CARRIERS OF PASSENGERS ARE NOT ANSWERABLE FOR LOWER DEGREES OF NEGLIGENCE on the part of their passengers until they amount to rashness and recklessness. *Id.*
9. CARRIERS OF PASSENGERS ARE REQUIRED TO USE HIGHEST DEGREE OF CARE, diligence, vigilance, and skill in the selection of materials, construction,

- of their vehicles and other means of transportation, and for their conduct and management, repair and preservation of them, with a view to the comfort, safety, and transportation of passengers and their baggage, and they are liable for slight neglect or carelessness in any of these particulars, qualified by the reciprocal duty of the passenger that his want of ordinary care does not cause or contribute to produce the injury. *Id.*
10. SHIPPER IS NOT BOUND TO TAKE FROM COMMON CARRIER REMNANT OF HIS Goods in whatever condition they may be identified and offered to him. And where a person delivers to a railroad company for transportation one thousand seven hundred and sixteen pounds of rags, put up securely in bags, he is not bound to receive from the company, at the place of destination, five hundred pounds of rags, lying about loosely outside of its depot, without any proof that they are the same rags. *Chicago & Rock Island R. R. Co. v. Warren*, 317.
11. RESPONSIBILITY OF COMMON CARRIER DOES NOT END until there has been a delivery of the goods to the owner or consignee, or to a warehouseman for storage. The carrier's liability cannot end until that of the owner, consignee, or warehouseman begins. *Id.*
12. WHERE COMMON CARRIER ALSO ACTS IN CAPACITY OF WAREHOUSEMAN in relation to the same goods, he must prove some open act of delivery before his liability can be changed from that of carrier to that of warehouseman. *Id.*
13. PLAINTIFF NEED NOT PROVE HIS OWN ORDINARY CARE TO AVOID INJURY, in an action against a ferry-man for injuries received in driving off from his boat, but proof of plaintiff's want of ordinary care lies on the defendant. *May v. Hanson*, 135.
14. DOCTRINE IN RELATION TO MUTUAL NEGLIGENCE OF PARTIES IN CAUSING INJURY is applicable to carriers of passengers by railroad. *Galena & Chicago Union R. R. Co. v. May*, 323.
15. PASSENGER TAKES ON HIMSELF Risk of Mode of TRAVEL HE ADOPTS; but the care, vigilance, and skill on the part of the carrier must be adapted to the motive power and means employed by him. The carrier and the passenger owe reciprocal duties to each other. *Id.*
16. CONDUCT AND EXCLAMATIONS OF PASSENGERS IN CAR, AT TIME OF ACCIDENT, are admissible in evidence as tending to show how the circumstances of apparent danger impressed others, and to vindicate from rashness the conduct of the plaintiff in leaping from the train, whereby he received the injury complained of. *Id.*
17. RAILROAD COMPANY DOES NOT, BY MERELY RECEIVING Goods MARKED TO Go to PLACE beyond its terminus, undertake to carry them beyond the line of its own road. Neither an advertisement published by the company, setting forth the facilities for transportation possessed by the company, nor a receipt given by it to the shipper, stating that it has received the goods for transportation, is evidence of a special contract to carry the goods to the place to which they are directed; such receipt proves nothing more than a promise to carry the goods to the end of the road and thence forward them by the usual conveyance. *Elmore v. Naugatuck Railroad Co.*, 143.
18. CARRIER, EVEN UNDER EXCEPTION OF DANGERS OF RIVER, IS LIABLE FOR Loss BY INCOMPETENCE or want of reasonable care, skill, and diligence of those whom he employs to navigate his vessel, as well as by insufficiency of the vessel or its equipments. *Bentley v. Bustard*, 561.

19. EXEMPTION OF "DANGERS OF RIVER" IN BILL OF LADING is analogous to the exception of "perils of the sea," and the principles applicable to both are substantially the same. *Id.*
20. UNKNOWN OBSTRUCTIONS TO NAVIGATION, to constitute such a danger of the river or peril of the sea as to excuse a carrier from liability for an accident caused thereby, are such obstructions as are not known to navigators generally, nor to those navigating the particular vessel, nor discoverable by them by reasonable vigilance in time to have avoided the accident. *Id.*
21. JETTISON OF GOODS IS NO EXCUSE OR JUSTIFICATION FOR NON-DELIVERY, in an action by the shipper against the carrier, unless it was caused by unavoidable perils of the sea or dangers of the river, and made necessary by circumstances over which the carrier and his servants had no control and could not have foreseen and guarded against by the exercise of vigilance appropriate to the respective situations of such servants and to the nature of the navigation, and which circumstances left no reasonable means of preventing a total loss but by sacrificing part of the property to save the rest. *Id.*
22. JETTISON, TO EXCUSE NON-DELIVERY OF Goods, MUST HAVE BEEN NECESSITATED by the act of God or of public enemies, by the common law, or by perils of the sea or dangers of the river, when expressed in the contract. *Id.*
23. JETTISON OF PART OF CARGO TO SAVE RESIDUE IS NOT JUSTIFIED, THOUGH NECESSARY, and though it prove successful, if by due care, skill, diligence, and activity on the part of the carrier or his servants the crisis which made it necessary might have been avoided. *Id.*
24. JETTISON MADE SOLELY TO PREVENT HARM TO VESSEL or to hasten the voyage, even though the danger and crisis could not be avoided, is unjustifiable, and furnishes no excuse for the non-delivery of the jettisoned goods. *Id.*
25. INSUFFICIENCY OF CARRIER'S ANSWER IN NOT STATING FACTS JUSTIFYING JETTISON, relied on as a defense for the non-delivery of goods, will not preclude reversal of a judgment against the carriers for errors occurring at the trial, where the answer does allege, in general terms, that the jettison was caused by a danger of the river and by an unforeseen and unavoidable accident; that all available means of relief were used, and that the danger of total destruction was imminent, etc., where the answer was adjudged sufficient on demurrer, and the parties went to trial upon it, and the facts were fully disclosed in the evidence. *Id.*
26. FERRY-MAN MUST SEE THAT TEAMS ARE SAFELY DRIVEN OFF FROM AS WELL AS UPON HIS BOAT. He may drive himself, or may unharness the team, or unload them, for the purpose of getting them safely on board. *May v. Hanson*, 135.
27. FERRY-MAN PERMITTING PARTY TO DRIVE HIS OWN TEAM OFF FROM OR UPON HIS BOAT constitutes him *quoad hoc* his agent, and is responsible for all accidents. *Id.*

See PLEADING AND PRACTICE, 12, 13, 17.

CONSTITUTIONAL LAW.

1. STATES MAY PROTECT THEMSELVES FROM EVILS OF PAUPERISM, IMMORALITY, AND CRIME. *Santo v. State*, 487.
2. STATE MAY PROHIBIT SALE OF SPIRITS WITHIN ITS BORDERS as a police or

- internal regulation, excepting only the case of the importer of foreign spirits selling in the original quantities imported. *Id.*
- 2. **IOWA LIQUOR LAW OF 1855 IS NOT IN CONFLICT WITH CONSTITUTION OR LAWS OF THE UNITED STATES.** *Id.*
 - 4. **LEGISLATURE CANNOT LEGALLY SUBMIT TO PEOPLE PROPOSITION WHETHER ACT SHOULD BECOME LAW OR NOT,** except where acts of incorporation are submitted to the acceptance of the corporators, whether private or municipal. *Id.*
 - 5. **PEOPLE HAVE NO POWER, IN THEIR PRIMARY AND INDIVIDUAL CAPACITY, TO MAKE LAWS,** that power being vested in the legislature. *Id.*
 - 6. **ACT COMPLETE IN ALL ITS PARTS WITHOUT SECTION THAT SUBMITS ACT TO VOTE OF PEOPLE** is not wholly unconstitutional and void, but such section only, and a vote taken thereon is merely nugatory. *Id.*
 - 7. **SECTION OF STATUTE THAT PROHIBITS LIQUOR-SELLING,** providing that vote of people for and against the act shall be taken, and if a majority be in favor of it it shall become a law, but omitting to provide that if the vote be against it it shall not become a law, is not unconstitutional, for the legislature may have designed to ascertain merely the moral sentiment of the people upon the subject of prohibition. *Id.*
 - 8. **IOWA LIQUOR LAW OF 1855 IS NOT WHOLLY UNCONSTITUTIONAL BECAUSE OF EIGHTEENTH SECTION** submitting it to vote of people, even if it would have been wholly void had that section distinctly put to a vote of the people whether the act should become a law or not, for that section provides merely that the act shall become a law if a majority of the votes cast be in its favor, and fails to enact that if the vote be against it it shall not become a law. *Id.*
 - 9. **ACT IS NOT IN VIOLATION OF CONSTITUTIONAL PROVISION THAT EVERY LAW SHALL EMBRACE BUT ONE OBJECT,** which shall be expressed in the title, although it embrace several ideas or steps in the progress of its provisions toward the attainment of the main object expressed in the title. This object may be a broader or a narrower one, but if the several steps embraced in it are fairly conducive to that end or object, it is still a unit. *Id.*
 - 10. **ACT REQUIRING CHARGE TO BE MADE IN LIKE MANNER AS IS REQUIRED IN RELATION TO OTHER OFFENSES,** but giving no especial directions, is not unconstitutional on the ground that the charge is not required to be distinctly and fully made. *Id.*
 - 11. **ACT IS NOT UNCONSTITUTIONAL ON GROUND THAT IT AUTHORIZES CRIMINAL PROSECUTION,** and that it is not made necessary to inform the defendant, and that he has not the right to be confronted with witnesses, although it does not require an arrest, if it requires a notice to him as effectual in substance as when he is sued for any amount of indebtedness and allows him to be confronted with witnesses. *Id.*
 - 12. **IOWA LIQUOR LAW OF 1855 REQUIRES NOTICE TO DEFENDANT AND TRIAL,** and is therefore not open to the constitutional objection that it authorizes a forfeiture or destruction of property, without notifying the defendant or without trial, and as a penalty for crime which need not be proved. *Id.*
 - 13. **ACT IS NOT UNCONSTITUTIONAL, ON GROUND THAT IT PRESUMES GUILT OF ACCUSED,** or inflicts penalty for a crime without proof, where it provides that proof of finding the liquor named in the possession of the accused, in any place except his private dwelling-house or its dependencies, shall

- be received and acted upon as presumptive evidence that such liquor was kept or held for sale contrary to the provisions of the act. *Id.*
14. ACT GIVING JUSTICE OF PEACE JURISDICTION OF OFFENSES IS NOT UNCONSTITUTIONAL because incidentally he may obtain cognizance of property of an undefined amount. *Id.*
 15. AUTHORIZATION OF SEARCH-WARRANT IS NOT "UNREASONABLE," so as to be unconstitutional, when it is authorized for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause. *Id.*
 16. FORFEITURE OF PROPERTY, TRAFFIC IN WHICH IS DEDIMENTAL AND DANGEROUS to public health, safety, happiness, and morals, is not a taking of private property for public use. *Id.*
 17. MUNICIPAL CHARTER CONFERRING UPON MAYOR JURISDICTION OF JUSTICE OF PEACE under the criminal laws of the state is not in conflict with the constitutional provision that no person charged with the exercise of powers properly belonging to one department of the government shall exercise any of the functions appertaining to either of the others. The "departments" are those of the state government, and the mayor is not a part of the state government. *Id.*
 18. OBJECTION THAT STATUTE WAS NOT PUBLISHED AS REQUIRED BY CONSTITUTION IS NOT MAINTAINABLE when the constitution provides that a law shall not take effect until published and circulated, but gives no detailed directions, and the code provides that such acts shall take effect on the first day of July following the session, and the act in question was actually published in the volume of session laws before the first day of July following the session. The act took effect on that day by virtue of these general provisions. *Id.*
 19. PART OF ACT MAY BE MADE TO TAKE EFFECT UPON PUBLICATION IN NEWSPAPERS, under constitutional provision that if the legislature deem a law of immediate importance they may provide that it take effect by publication in newspapers. *Id.*
 20. ACT AUTHORIZING SEARCH-WARRANT IS NOT UNCONSTITUTIONAL, on ground that it does not require particular description of place to be searched or property to be seized, when it requires the place, person, and property to be described "as particularly as may be." *Id.*
 21. POWER OF JUDICIARY TO DECLARE ACT UNCONSTITUTIONAL is of the most delicate and responsible nature, and not to be resorted to unless the case be clear, decisive, and unavoidable. *Id.*
 22. RIGHT TO MANUFACTURE AND SELL INTOXICATING LIQUORS IS PROTECTED BY INDIANA CONSTITUTION, and an act of the legislature prohibiting it is unconstitutional and void. *Beebe v. State*, 390.
 23. EACH BRANCH OF JUDICIAL DEPARTMENT OF CALIFORNIA HAS ITS FUNCTIONS ASSIGNED by the constitution, and is beyond the control of either of the other departments of the government. *Parsons v. Tuolumne County Water Co.*, 76.
 24. TERM "SPECIAL CASES," IN CLAUSE OF CONSTITUTION permitting legislature to confer on county court jurisdiction in "special cases," does not include any class of cases for which the courts of general jurisdiction have always supplied a remedy. The special cases, therefore, must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity. *Id.*

25. LEGISLATURE CANNOT EXERCISE JUDICIAL FUNCTIONS. *Guy v. Horne*, 85.
26. PORTION OF STATUTE PRESCRIBING THAT NO INJUNCTION SHALL ISSUE AGAINST COMMISSIONERS appointed by the statute is invalid, being the exercise of a judicial function by the legislature. *Id.*
See ESTATES OF DECEDENTS, 2; STATUTES.

CONTRACTS.

1. TO CONSTITUTE CONTRACT, PARTIES THERETO MUST ASSENT TO SAME THING in the same sense. *Hartford & New Haven R. R. Co. v. Jackson*, 177.
2. WHERE ONE PARTY TO CONTRACT, AFTER HE DISCOVERS MISTAKE on his part as to the terms thereof, and while he is conscious that the other party has no knowledge of the mistake, proceeds to perform his part of the contract, such performance is not conclusive evidence of his assent to the terms of the contract as understood by the other party, nor does it preclude him from showing that there was a mistake. The question whether or not he assented to the contract as understood by the other party is, in such a case, merely a question of fact to be determined by the jury, on all the evidence before them. The facts and circumstances tending to show such an assent on his part are not entitled, as evidence, to any artificial effect, but are to be weighed like ordinary circumstantial evidence. *Id.*
3. PARTY SEEKING TO RECOVER ON BREACH OF CONTRACT containing mutual and dependent covenants must aver and prove his own offer and readiness to perform, and that the other party has failed to perform on his part. *Sargent v. Adams*, 718.
4. PARTY TO CONTRACT FOUNDED ON CONCURRENT CONDITIONS SEEKING TO RECOVER FOR BREACH thereof must show that he was ready and willing to perform his part of the agreement. *Smith v. Lewis*, 180.
5. REFUSAL TO PERFORM HIS COVENANTS BY ONE PARTY TO CONTRACT founded upon mutual conditions will excuse a want of entire and absolute preparation by the other party. *Id.*
6. VOLUNTARY ABSENCE OF ONE PARTY FROM PLACE ASSIGNED FOR PERFORMANCE of a contract is equivalent to a refusal to perform on his part, and excuses the other party in suspending preparations for performance on his part, whenever such suspension would be the natural effect of just and reasonable inferences drawn by the latter from such absence and its attendant circumstances. *Id.*
7. SEALED EXECUTORY CONTRACT CANNOT BE DISCHARGED BY EXECUTORY VERBAL AGREEMENT. *Id.*
8. PAYMENT OF INTEREST IN ADVANCE IS SUFFICIENT CONSIDERATION to support an agreement for further forbearance. *Dickerson v. Board of Commissioners of Ripley County*, 373.
9. CONTRACTS AND DEEDS MADE IN FOREIGN COUNTRY must, in the absence of evidence of what their legal effect would be in the place in which they were executed, receive the same construction and have the same effect as if they were executed in the place where the action to enforce them is brought. *Whidden v. Seelye*, 661.
10. CONTRACT IN GENERAL RESTRAINT OF TRADE IS VOID. *Beard v. Davis*, 380.

11. CONTRACT IN RESTRAINT OF TRADE IS UNREASONABLE AND VOID, as injurious to the public, on the ground of public policy, when the restraint is larger than is required for the necessary protection of the party with whom the contract is made. *Id.*
12. EFFECT WILL BE GIVEN TO STIPULATIONS IMPOSING REASONABLE RESTRAINT OF TRADE, and not to those which are unreasonable, where the stipulations in the contract are divisible, and part impose reasonable and part unreasonable restraints. *Per Perkins, J. Id.*
13. CONTRACT IN RESTRAINT OF TRADE WILL NOT BE IMPLIED, it seems, from the mere sale of the good-will of a business. *Id.*
14. CONTRACT IN RESTRAINT OF TRADE, WITHIN LIMITS THAT MAY BE ADJUDGED REASONABLE by the court, and not injurious to the public, is valid. *Id.*
15. CONTRACT IN REASONABLE RESTRAINT OF TRADE MUST BE UPON CONSIDERATION, like contracts generally; but the parties may agree upon what the consideration shall be, so that it is legal; and the mere purchase of a stock in trade is a sufficient consideration for the vendee's agreement to abstain from carrying on the particular trade in the place where the purchaser is to engage in it. *Id.*
16. MONEY PAID UNDER AGREEMENT FOR LEASE CANNOT BE RECOVERED BACK on the ground of breach of the agreement, because the lease offered contained covenants on the part of the lessee to cleanse the drains and vaults, and not to assign nor underlet, nor make alterations without the consent of the lessor, if at the time of such offer the lessee failed to specify his objections to the lease, though requested to do so by the lessor. *Sargent v. Adams*, 718.

See EVIDENCE, 7; INJUNCTIONS, 1, 2; MARRIED WOMEN, 5, 6; PARTNERSHIP, 3; TIME, 1-4.

CONTRIBUTION.

See DEBTOR AND CREDITOR, 1.

CONVERSION.

See TROVER, 1.

CORPORATIONS.

1. DIRECTORS OF CORPORATION, FOR FRAUD AND MISCONDUCT IN OFFICE, are liable to the corporation. *Smith v. Poor*, 672.
2. STOCKHOLDER IN CORPORATION CANNOT MAINTAIN ACTION AGAINST DIRECTORS to recover compensation for damage suffered in a contract made by him with such corporation through the fraudulent votes and acts of such directors, his remedy being properly against the corporation itself. *Id.*
3. STOCKHOLDER CANNOT MAINTAIN BILL TO COMPEL DIRECTORS TO ACCOUNT where they fraudulently abuse their trust, unless it first appear that the corporation, as such, refuses to sue, or that the acting directors are the parties guilty of the fraud. *Id.*
4. CORPORATIONS ARE HELD TO PRESUMED OR IMPLIED AGENCIES, authority, and instruction, to those who are held out or permitted to act for them in their usual course of dealing within their charter powers, when not controlled specially by its provisions, the by-laws, or the nature and character of the contract, or the subject-matter of it. *Ryan v. Dunlap*, 334.

6. REPRESENTATIONS TO SUBSCRIBERS TO STOCK IN RAILROAD COMPANY, by the commissioners appointed to receive stock subscriptions, as to the future location of the road, where the commissioners, by the terms of the charter, have nothing to do with the location, cannot render the subscriptions invalid, where it is not shown that the subscribers were ignorant of the terms of the charter, or that they were deceived or misled by the commissioners. *Wight v. Shelby R. R. Co.*, 522.
7. WHETHER CORPORATION WAS PROPERLY ORGANIZED UNDER CHARTER cannot be determined collaterally in an action on a subscription to stock in the corporation, but only by a direct proceeding. *Id.*
7. SUBSCRIBER TO CORPORATE STOCK CANNOT INVALIDATE SUBSCRIPTION by alleging non-receipt of the stock by the commissioners, where the corporation recognizes his stock as valid. *Id.*
8. NON-PAYMENT BY SUBSCRIBER TO CORPORATE STOCK OF SUM REQUIRED by law to be paid on each share at the time of the subscription does not release him from liability for his subscription, and is no defense to an action thereon. *Id.*
9. PROVISIONS OF CORPORATE CHARTER ARE PRESUMED KNOWN TO SUBSCRIBERS to the stock of the corporation. *Id.*
10. STOCK SUBSCRIPTION CANNOT BE DELIVERED AS ESCROW TO COMMISSIONERS appointed to receive subscriptions, to take effect only on a specified condition, but the subscription is absolute, and the non-performance of the condition is no defense. *Id.*
11. PAROL EVIDENCE TO VARY STOCK SUBSCRIPTION OR SHOW IT CONDITIONAL, when it is not so on its face, is inadmissible. *Id.*
12. NO TRANSFER OF STOCK IS VALID AGAINST THIRD PARTIES until the same shall have been entered upon the books of the corporation, under the California statute concerning corporations. *Weston v. Bear River etc. Mining Co.*, 117.
13. WRITTEN PROMISE TO TAKE CERTAIN NUMBER OF SHARES OF STOCK in a corporation which it is proposed to organize becomes a valid and binding contract by the subsequent organization of the corporation, and its acceptance of the subscription. *Penobscot Railroad Co. v. Dummer*, 654.
14. SHARES IN CORPORATION CANNOT BE LEGALLY ASSESSED before the number of shares required by its charter has been taken. *Id.*
15. RECORDS OF CORPORATION ARE COMPETENT AND SUFFICIENT EVIDENCE, where no proof is introduced to destroy their effect, to show who are its corporators, and whether or not the required number of shares of its stock, provided by its charter, has been subscribed. *Id.*
16. WHERE SUBSCRIPTION FOR STOCK STIPULATES THAT "ASSESSMENTS SHALL NOT EXCEED FIVE DOLLARS on each share at one time," several assessments may be voted at the same time, provided that no greater sum than five dollars on each share be made payable at one time. *Id.*
17. PROVISION THAT SEVENTY-FIVE PER CENT OF COST OF RAILROAD SHALL BE SUBSCRIBED by responsible persons before it can commence to construct its road will not invalidate assessments on stock subscribed because some of the subscriptions necessary to make up that amount turn out to be worthless, if such subscriptions were obtained in good faith. *Id.*
18. NO DEMAND FOR PAYMENT OF ASSESSMENT NEED BE MADE other than the giving of the notice required by the by-laws of the corporation, in order to maintain an action therefor. *Id.*

19. LAW WILL PRESUME IN FAVOR OF EXISTENCE OF MUNICIPAL CORPORATION, created for the public good and demanded by the wants of the community, where there has been a long-continued use of corporate powers, and an acquiescence on the part of the public. *Jamison v. People*, 304.
20. PUBLIC ACTS OF LEGISLATURE, RECOGNIZING EXISTENCE OF MUNICIPAL CORPORATION and empowering it to act as a body corporate in issuing and negotiating obligations thereof, preclude inquiry into the question of the original legal organization of such corporation, and are conclusive on the question of its existence. *Id.*

See ATTACHMENTS, 4-7; FRANCHES.

CO-TENANCY.

1. ONE TENANT IN COMMON CANNOT SUBJECT COMMON PROPERTY to particular servitudes, by which the rights of his co tenants will be affected. *Hutchinson v. Chase*, 645.
2. IF ONE OF TWO TENANTS IN COMMON OF MILL AND MILL SITE, TO WHICH WAS APPURTENANT the right of flowing other lands above, owned by them in common, conveys his undivided one half to his co-tenant, together with appurtenances, this authorizes the latter to continue the flowing of such common lands and to transfer such right to his grantee. *Id.*
3. IF ONE TENANT IN COMMON OF LAND OUST HIS CO-TENANT, LATTER MAY MAINTAIN EJECTMENT; if he destroys personal property owned in common, trover lies; if he sell the entire property, an action will lie against him; nor can he convey any part of the common property by metes and bounds. *Id.*

See HOMESTEADS, 4; PARTNERSHIP, 1.

COUNTIES.

1. COUNTY CANNOT SUE OR BE SUED EXCEPT WHERE SPECIALLY PERMITTED by statute, and such permission can be withdrawn or denied at any time the legislature may think proper. *Hunsaker v. Borden*, 130.
2. COUNTY DEBT CREATED BY AUTHORITY OF LAW IS PART OF PUBLIC STATE DEBT, and as there may be no remedy against the state, so there may be none against the county. *Id.*
3. BOARD OF SUPERVISORS ARE LEGAL SUCCESSORS TO COUNTY COMMISSIONERS' COURT, in Illinois, where the township organization is adopted, and as such succeed to the legal title to official bonds, on which they may bring suit. *Green v. Wardwell*, 366.

See STATUTES, 10.

COURTS.

1. COURTS ARE BOUND TO TAKE NOTICE OF POLITICAL AND SOCIAL CONDITIONS of the country which they judicially rule. *Irwin v. Phillips*, 113.
2. IT IS NOT ERRONEOUS FOR COURT TO OFFER TERMS TO DEFENDANT. *Meg v. Hanson*, 135.
3. PROBATE COURT IS COURT OF SPECIAL AND LIMITED JURISDICTION. *Clark v. Perry*, 82.
4. MOST OF GENERAL POWERS OF PROBATE COURT belong peculiarly and originally to court of chancery, which still retains all of its jurisdiction. *Id.*

5. DISTRICT COURT OF IOWA MAY, UPON APPEAL FROM JUSTICE'S COURT, refuse to grant a new trial, and refuse a trial by jury. *Sando v. State*, 487.

See ESTATES OF DECEDENTS, 2.

COVENANTS.

1. RESTRICTION OF COVENANT AGAINST ASSIGNMENT CONTAINED IN LEASE, when once removed, is forever removed. *Chipman v. Emeric*, 80.
2. RESTRICTION OF COVENANT AGAINST ASSIGNMENT CONTAINED IN LEASE will never be so enforced as to produce a forfeiture. It is a restraint against alienation and against the policy of the law. *Id.*
3. LESSEE'S COVENANT TO BUILD WHARF, NO PARTICULAR TIME BEING STIPULATED, may be complied with at any period before the expiration of the time, and until then the lessor can have no legitimate cause of complaint. *Id.*
4. COVENANT "TO LET LESSOR HAVE WHAT LAND HE AND HIS BROTHERS MIGHT WANT FOR CULTIVATION" is too uncertain to be enforced. *Id.*

See CONTRACTS, 3-6.

CRIMINAL LAW.

1. LARCENY OF GOODS IN FOREIGN COUNTRY AND BRINGING THEM INTO COMMONWEALTH of Massachusetts does not constitute larceny, in Massachusetts, for which an indictment will lie. *Commonwealth v. Uprichard*, 762.
2. IF THERE IS ANY EVIDENCE, IN CASE OF HOMICIDE, upon which the jury might have mitigated the charge from murder to a lower offense, or if there is any evidence which would leave any doubt whether the defendant acted with malice or had not been actuated by principles of self-preservation, then the defendant is entitled to have the jury instructed as to the different degrees of homicide, and what constitutes each. *Keener v. State*, 269.
3. THREATS OF DECEASED PRIOR TO TIME OF HOMICIDE, uncommunicated to the defendant, may be introduced in evidence to show the state of feeling entertained by the deceased toward the accused; but cannot be introduced by the defendant as a justification of the homicide, unless he shows that such threats were brought to his knowledge prior to the act. The remoteness or nearness of time as to the threats, pointing to the act subsequently committed, makes no difference as to the competency of the testimony. *Id.*
4. SALE CONSTITUTES BET ON ELECTION, and the parties are indictable therefore where the substance of the contract is that the property sold shall be paid for at a fair value, or more, in case a particular election shall result in a certain way, and shall not be paid for at all or shall be paid for at less or more than its value if the election shall result in a certain other way. *Commonwealth v. Shouse*, 551.
5. INDICTMENT FOR BETTING ON ELECTION OF PARTICULAR PERSON at a certain election is fatally defective if it does not show such person to have been a candidate, or to have been voted for, or in any way proposed to be chosen at such election. *Id.*
6. INDICTMENT FOR OFFENSE AGAINST PUBLIC MORALS, AND NOT AGAINST INDIVIDUAL, is SUFFICIENT WHICH CHARGES that the defendant, "on Sun-

day, the second day of April, A. D. 1854," in the county where the indictment was found, "did sell to divers persons a large quantity of ardent spirits, to wit," etc., without stating the names of the persons to whom the spirits were sold, or that they were sold to some person to the grand jurors unknown. *State v. Parnell*, 72.

See CONSTITUTIONAL LAW, 10, 11, 13, 17; INSANITY, 1-3; INSTRUCTIONS, 3; JURY AND JURORS, 1, 3; PLEADING AND PRACTICE, 33; WITNESSES, 8.

DAMAGES.

1. MEASURE OF DAMAGES FOR FAILURE TO DELIVER GOODS AT SPECIFIED TIME AND PLACE, when the price is not paid or advanced before time for delivery, is the difference between the contract price and the market price at the time for delivery. *Cannon v. Folsom*, 474.
2. MEASURE OF DAMAGES FOR FAILURE TO DELIVER GOODS AT SPECIFIED TIME AND PLACE, where price has been paid prior to time for delivery, is the highest market price between day for delivery and time when suit is brought, provided the plaintiff does not unreasonably delay the institution of his suit. *Id.*
3. IN ACTION FOR BREACH OF WRITTEN CONTRACT TO DELIVER SAW-LOGS, plaintiff cannot recover prospective profits to accrue from sawing the logs into lumber, nor damages for his mill lying idle and the wages of laborers to take care of it. *Id.*
4. IN ESTIMATING DAMAGES SUSTAINED BY FATHER FROM INJURY to his infant son, the jury may take into consideration the expense of medical attendance, the loss to the father through neglect of business during his son's illness, and the loss likely to arise to the father from the son's crippled state during the period when he would be able to provide for his own support or assist his father; but the jury cannot consider the mental anguish or suffering which the injury caused the father. *Black v. Carrollton Railroad Co.*, 586.
5. EXEMPLARY OR VINDICTIVE DAMAGES WILL NOT BE ALLOWED to a father for an injury to his infant son, and will only be allowed to the immediate person receiving the injury, either in a suit prosecuted by himself or by some one for his use. *Id.*

See REPLEVIN, 1.

"DANGERS OF THE RIVER."

See COMMON CARRIERS, 18-22, 25; SHIPPING, 6, 7.

DEBTOR AND CREDITOR.

1. CREDITOR CANNOT SO DEAL WITH ONE OF HIS DEBTORS IN JOINT CONTRACT as to place the co-debtor in a position where it will be impossible for him to enforce contribution in case he pays the debt. *Hurst v. Hill*, 705.
2. DEBTOR MAY GIVE PREFERENCE TO ONE CREDITOR OVER ANOTHER, if the instrument intended to effect that object contains the requisite provisions. But if, by mistake of law, the parties adopt such an instrument as cannot effect their intention without the aid of a court of equity, the court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of a debtor in very embarrassed circumstances. *Anderson v. Tydings*, 708.

- 8. COUNT OF EQUITY WILL NOT DEPRIVE CREDITORS OF LEGAL ADVANTAGE** which they have by reason of a mistake of law in the drawing of a deed, by reforming such deed for the benefit of parties who have no stronger equity than they. *Id.*

See ATTACHMENTS, 1; EXECUTIONS, 1-6.

DECLARATIONS.

See EVIDENCE, 8, 9.

DEEDS.

1. CONSIDERATION OF LOVE AND AFFECTION, IN DEED, will support an inheritance. *Plemon v. Armstrong*, 440.
2. MERE RETENTION OF DEED BY GRANTOR, OF ITSELF, WILL NOT AFFECT ITS VALIDITY, unless it be declared or understood, at the time of its execution, that the deed is not to pass out of the possession of the grantor. *Wellborn v. Weaver*, 235.
3. DEED TO BE DELIVERED AT DEATH OF GRANTOR.—Where the grantor in a deed of gift gave it to one of the subscribing witnesses, with instructions to have it recorded, and to hold it as his agent until he should be dead, and then to deliver it to the donees, which instructions were followed, it was held that it could not take effect as his present deed, nor as an escrow, but if valid at all, it must be as a testamentary paper, and be proved accordingly. *Id.*
4. AUTHORITY GIVEN TO AGENT BY GRANTOR OF DEED TO DELIVER SAME, to be validly exercised, must be performed in the life-time of such grantor, as the agent's authority is terminated by his death. *Id.*
5. TO CONSTITUTE WRITING ESCROW merely, it must be placed in the hands of a third person, to be delivered on the happening of a specified contingency. *Wight v. Shelby Railroad Co.*, 522.
6. DELIVERY IS AS ESSENTIAL TO VALIDITY OF ESCROW AS TO DEED; the only difference being as to the manner of delivery. *Wellborn v. Weaver*, 235.
7. ESCROW GENERALLY TAKES EFFECT FROM DATE OF SECOND DELIVERY; but when justice requires a resort to a fiction, this time relates back to the first delivery, so as to give the deed effect from that time. *Id.*
8. PERSON TO WHOM ESCROW HAS BEEN DELIVERED IS AGENT OF BOTH GRANTOR AND GRANTEE. He does not hold the deed subject to the control of the grantor, who has no power over it, and can no more command its delivery than he could that of an absolute deed. *Id.*
9. DEED TAKES EFFECT ONLY FROM ITS DELIVERY, WHICH MAY BE BY WORDS without acts, or by acts without words, and may be made either to the grantee or to a third person, who has no special authority, for the use of the grantee; further, a grantee need not be personally present to accept the delivery of a deed. *Id.*
10. REGISTRATION OF DEED DOES NOT AMOUNT TO DELIVERY THEREOF, and its being placed on record by the direction of the grantor is but *prima facie* evidence of its delivery, which may be explained and rebutted by testimony. *Id.*
11. DEED, IF MADE WITH VIEW TO DISPOSITION OF MAN'S ESTATE AFTER HIS DEATH, will inure, in law, as a devise or will. Whether an instru-

- ment be a deed or will does not depend on its form or manner of execution, but upon its operation. *Id.*
12. INSTRUMENT WHICH WAS IN FORM DEED may be shown to be a will, as the intention of the maker may be ascertained not only from the instrument but from extrinsic testimony. Declarations of a party in possession of property and exercising acts of ownership may be admitted in evidence, not for the purpose of showing title in himself, but for the purpose of rebutting the presumption that he held as trustee, and as fortifying his possessory title. *Id.*
 13. DEED FROM BANK IS PRIMA FACIE Good when signed by the president and countersigned by the cashier. *Veasey v. Graham*, 228.
 14. DEED FROM PRESIDENT OF BANK TO HIMSELF IS NOT ABSOLUTE NULLITY, although the law looks with great suspicion upon such transactions. It is at least admissible as color of title. *Id.*
 15. WHERE PRESIDENT OF BANK MAKES DEED TO HIMSELF, IN ORDER TO MAKE his occupancy of the property conveyed adverse to the bank, he must give it notice that he has ceased to hold it as president, and has commenced to hold it in his individual capacity. *Id.*
 16. WHERE CASHIER OF BANK EXECUTES DEED, BANK IS HELD TO HAVE NOTICE of its contents. *Id.*
 17. NOTICE IS GIVEN TO BANK, WHOSE PRESIDENT HAS MADE DEED OF CERTAIN of its property to himself, that such president is holding it in his individual capacity, where he purchases negroes, and employs overseers to farm said lands, as such acts are not performed by banks. *Id.*
 18. PROOF THAT SEAL AFFIXED TO DEED IS CORPORATE SEAL IS UNNECESSARY when the deed is shown to have been duly executed by one having authority. Under such circumstances the seal is *prima facie* that of the corporation. *Phillips v. Coffee*, 357.
 19. WORDS "HAVE GIVEN AND GRANTED," IN DEED, are sufficient to pass an estate in fee; and the words "to her and her own proper and legal heirs forever," in the *habendum* of a deed, are sufficient to pass an estate of inheritance. *Pierson v. Armstrong*, 440.
 20. CONTENTS OF DEED CANNOT BE PROVED if the deed has been surrendered and destroyed by the party's own voluntary act or consent, and such surrender and destruction of an unrecorded deed may have the effect of divesting his title by estopping him from proving the contents. *Speer v. Speer*, 418.
 21. DESTRUCTION OF JOINT DEED BY ONE GRANTEE WITHOUT OTHER'S CONSENT does not have the effect to divest the title which vested in them jointly. *Id.*
 22. DEED WILL NOT BE REFORMED AS TO COVENANT THEREIN after an action for its breach has been brought against the defendants by the complainant, who suffered a recovery against him for costs. *Rufner v. McConnell*, 362.
 23. DEED WILL BE REFORMED FOR MISTAKE OF FACT only upon clear and satisfactory evidence of the mistake; but this does not extend to mistakes of law, or to mistakes in the intention of one only of the parties without fraud in the other. *Id.*

See DEBTOR AND CREDITOR, 3; JUDICIAL SALES, 3; MORTGAGES, 3, 7; PARTNERSHIP, 3; REVERSIONS.

DENTISTS.

See NEGLIGENCE.

DEPOSITIONS.

IN DEPOSITION, WITNESS MAY ANSWER CROSS-INTERROGATORIES BY REFERENCE to his answers to the direct questions. *Printup v. Mitchell*, 253.
See EVIDENCE, 14.

DETINURE.

DEMAND FOR RETURN OF CHATTEL MUST BE MADE BY OWNER OF BONA FIDE PURCHASER, even from the wrongful taker, before he is liable to an action to recover the possession, although the one who wrongfully took the chattel is liable without demand. *Wood v. Cohen*, 389.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

1. **DOMICILE OF HUSBAND IS DOMICILE OF WIFE.** *Beard v. Knox*, 125.
2. **DOMICILE OF FATHER IS**, in legal contemplation, the domicile of his minor children. *Grimmett v. Withington*, 66.
3. **MINOR CHILDREN USUALLY RETAIN DOMICILE OF THEIR DECEASED PARENT;** but when a natural tutrix, the mother of a child, removes her domicile to another country, taking her child with her, the domicile of the child is changed with that of the mother. *Succession of Lewis*, 600.

See EXECUTORS AND ADMINISTRATORS, 15; GUARDIAN AND WARD, 1-3.

DOWER.

See HUSBAND AND WIFE, 1.

DRUGGISTS.

See NEGLIGENCE.

EASEMENTS.

See SOVEREIGNTY, 4, 5.

ECCLESIASTICAL LAW.

See MANDAMUS, 1-3,

EJECTMENT.

See CO- TENANCY, 3.

ELECTIONS.

See CRIMINAL LAW, 4, 5.

EMINENT DOMAIN.

1. **LAQUOR IN PROPERTY**, and as such can only be taken for public purposes and after full compensation. *Beebe v. State*, 390.
2. **LEGISLATURE CANNOT ENLARGE ITS POWER OVER PROPERTY OR PURSUITS** by declaring them nuisances. *Id.*

See CONSTITUTIONAL LAW, 16.

EQUITY.

1. EQUITY WILL NOT GRANT RELIEF UPON GROUND OF MISTAKE arising from ignorance of law. *Pierson v. Armstrong*, 440.
2. PARTY'S FAILURE TO MAKE DEFENSE AT LAW THROUGH MISTAKE AS TO HIS RIGHTS does not entitle him to relief in chancery. *Dickerson v. Board of Commissioners of Ripley County*, 373.
3. EQUITY IS WILLING TO GIVE IMMEDIATE PARTIES TO INSTRUMENT PRIVILEGE OF CORRECTING its errors arising from mistake when the controversy is between themselves, but is averse to permitting such corrections when the rights of strangers are involved. *Anderson v. Tydings*, 708.
4. IF FULL REDRESS HAS BEEN PROVIDED BY STATUTE, EQUITY IS OUSTED OF ITS JURISDICTION in such cases as partitions, the establishment of lost papers, the foreclosure of mortgages, the settlement of accounts, etc., notwithstanding the English rule adopted here giving equity exclusive or concurrent jurisdiction of such cases. *Osborn v. Ordinary of Harris County*, 230.
5. WHERE STATUTES OF STATE PROVIDE REMEDY UPON GUARDIAN's and other trustee bonds, to give equity jurisdiction of such, a special case must be made by the bill. An allegation that the guardian is a non-resident, or that before leaving the state he gave a large sum of money to his sureties to indemnify them, where the bill does not seek to pursue said sum as a trust fund, is insufficient. *Id.*
6. WHERE FATHER CONVEYS LAND TO MARRIED DAUGHTER in consideration of love and affection, and upon condition that if she shall die without children living at the time of her death the land shall revert to the grantor and his heirs, as though no conveyance had been made; and the daughter dies, leaving an infant child surviving her, who subsequently dies leaving his father heir to the property, a bill filed by the grandfather of the child against his father, alleging that it was the complainant's intention in making the deed to his daughter that her husband should never in any event have any interest in or control over the property, and that the deed was executed by him with that understanding, and praying that the complainant may be quieted in his title, and that the cloud cast thereon by said deed be removed, shows no equitable right in the complainant. *Pierson v. Armstrong*, 440.

See ACCOUNT, 1; COURTS, 4; DEBTOR AND CREDITOR, 2, 3; ESTOPPEL; EXECUTORS AND ADMINISTRATORS, 6; INJUNCTIONS; MANDAMUS, 2, 3; MARRIED WOMEN, 3; MORTGAGES, 12-15; RECEIVERS, 1, 2; SPECIFIC PERFORMANCE.

ERROR.

See PLEADING AND PRACTICE; WRIT OF ERROR.

ESCROW.

See CORPORATIONS, 10; DEEDS.

ESTATES.

See DEEDS; HUSBAND AND WIFE; TRUSTS AND TRUSTEES, 9; WILLS.

ESTATES OF DECEDEDENTS.

1. POSTHUMOUS CHILD TAKES BY DESCENT, at all events under the Illinois statute of wills, the same as if he had been born during the life-time of the intestate. *Smith v. McConnell*, 340.

2. PROBATE COURT MUST DETERMINE WHETHER THERE ARE DEBTS against estate of a decedent or not; the legislature have no constitutional power to find and determine that fact. And if the probate records and files fail to show that there were such debts, parol evidence is not admissible to prove their existence. *Davenport v. Young*, 320.

See EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES, 3, 4, 9; WILLS.

ESTOPPEL.

1. EQUITABLE ESTOPPEL IS DEFENSE AVAILABLE AT LAW as well as in equity. *Dickerson v. Board of Commissioners of Ripley County*, 373.
2. DOCTRINE OF ESTOPPEL IN PARS DISCUSSED. *Titus v. Moore*, 685.
3. SILENCE OF PARTY HAVING FULL KNOWLEDGE OF HIS OWN RIGHTS, so as to intentionally permit others to be deceived and misled in relation to them, will conclude him from afterwards interposing his claim to the prejudice of the party thus deceived or misled. *Id.*
4. SILENCE OF PARTY IGNORANT OF HIS RIGHTS does not generally operate to his prejudice, but if he induce others, equally ignorant, by his active interference, to pursue a particular course, he will be estopped to deny rights acquired thereunder, on the ground that where one of several innocent parties must suffer, the loss should fall on the one by whom it was occasioned. *Id.*
5. ESTOPPEL DOES NOT OPERATE TO PRECLUDE PURCHASER of one of two contiguous lots sold at public auction, at which sale a third person, at the vendor's request, points out the line between two lots, to which boundary no objection is made, from claiming to the true line of his lot beyond the one thus pointed out, unless at the time of the sale he knew where the true line of the lots was, and the other purchaser was induced, and did purchase, in consequence of his silence, or of some other acts done by him. *Id.*

See JUDICIAL SALES, 2, 5; SHERIFFS, 6.

EVIDENCE.

1. WRITTEN CONTRACT CANNOT BE ENLARGED BY PAROL EVIDENCE. *Cameron v. Folsom*, 474.
2. PAROL EVIDENCE IS INADMISSIBLE TO ANNUL OR SUBSTANTIALLY VARY WRITTEN AGREEMENT, except for fraud. *Iroquois v. Feers*, 420.
3. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN LATENT AMBIGUITY in written agreement to lease for a term of years the "Adams house, situate on Washington street, in Boston," so as to show that the intention of parties was to include only that part of the building fitted up as a hotel under the name of the "Adams house," and not the separate shops below, which occupied all the ground floor except the part used as an entrance to the hotel. *Sargent v. Adams*, 718.
4. PAROL TESTIMONY THAT ORDER WAS DRAWN IN FAVOR OF PLAINTIFF, THAT MISTAKE WAS MADE in writing his name, and that the order was in his hands, and was accepted as due to him, should be received. *Jacobs v. Benson*, 609.
5. AFTER EXECUTION OF INSTRUMENT HAS BEEN PROVED IN USUAL MANNER, court should admit it in evidence, regardless of any apparent alterations upon it, the nature of which should be passed upon by the jury. *Printup v. Mitchell*, 258.

6. PAROL CONTRACT ALLEGED IN BILL, WHICH IS DENIED BY ANSWER thereto, may be established by parol evidence; the answer may be contradicted by evidence *alibi*. *Id.*
7. PAROL CONTRACT FOR LAND SHOULD BE PROVED by clear and indisputable evidence, leaving no reasonable doubt as to its terms. *Id.*
8. DECLARATIONS.—The admissibility of, generally, discussed. *Id.*
9. DECLARATIONS OF PARTY AT WORK UPON BUILDING, THAT HE WAS WORKING FOR M., are admissible in evidence, as part of the *res gestae*, as tending to show that he had no interest in the building. *Id.*
10. ADMISSIONS.—Admissions should be clearly proved, deliberately made, and precisely identified, in order to be good evidence; but hasty and inadvertent verbal admissions, however clearly proved, are entitled to little consideration. *Id.*
11. RECEIPT OF PARTY WHO IS HIMSELF COMPETENT WITNESS is hearsay evidence, and inadmissible. *Id.*
12. LAW OF FOREIGN COUNTRY IS FACT TO BE PROVED. *Whidden v. Seelye*, 661.
13. COPY OF ITEMS OF ACCOUNT MADE FROM MERCHANT'S ACCOUNT-BOOK and sworn to by him are inadmissible as evidence to establish such account in an action for goods sold and delivered, although the books themselves have been burned. *Creamer & Graham v. Shannon*, 226.
14. DEPOSITION OF WITNESS IS NOT COMPETENT TO PROVE STATUTE of a sister state. The Iowa code provides that such statute may be proved by producing a printed copy. *Latterell v. Cook*, 428.
15. WHEN TRANSCRIPT OF RECORD IS ADMISSIBLE IN EVIDENCE.—The record of proceedings against an administrator and his sureties in one state, instituted by one of the distributees of an estate for his distributive share, had without notice to the administrator, and which resulted in a decree against the heirs of a deceased surety for their proportional part of the sum due, and followed by supplementary proceedings in execution returned satisfied, is invalid as the foundation of an action, in a sister state, against the administrator, for want of notice; but it is admissible in an action against him by the heirs for money paid, as *prima facie* evidence of the sum due by the administrator, of the obligation of the heirs to pay, of the assent of the administrator to the payment, and of the actual payment of the money. *Snider v. Greathouse*, 54.

See AGENCY, 7, 8, 11; ALTERATION OF INSTRUMENTS; BANKS AND BANKING, 3; COMMON CARRIERS, 13; CORPORATIONS, 11; DEEDS, 10, 12, 20; DEPOSITIONS; ESTATES OF DECEDENTS, 2; INNKEEPERS, 1, 2; INSANITY, 1-3; JUDGMENTS, 4-7, 12; NEGOTIABLE INSTRUMENTS, 12; PLEADING AND PRACTICE, 2, 26, 30, 36; SHERIFFS, 7; SLANDER, 1; TRUSTS AND TRUSTEES, 1, 8; WITNESSES.

EXECUTIONS.

1. WORD "NECESSARY," IN CONNECTICUT STATUTE EXEMPTING FROM EXECUTION HOUSEHOLD FURNITURE of the debtor, while it excludes superfluities and articles of luxury, fancy, and ornament, embraces those things that are requisite to enable the debtor not merely to live, but to live in a convenient and comfortable manner. *Montague v. Richardson*, 173.
2. STATUTE OF CONNECTICUT EXEMPTING CERTAIN PROPERTY OF DEBTOR FROM EXECUTION is a remedial one, and having been passed for a humane

purpose, ought to be liberally construed in furtherance of the benevolent objects for which it was enacted. *Id.*

2. LAW EXEMPTING FROM EXECUTION NECESSARY FURNITURE OF DEBTOR exempts such articles as are necessary when the levy is made, and not merely those that were necessary when the law was passed. *Id.*
4. WHETHER APPARATUS CALLED RANGE IS STOVE or not, within the meaning of the statute exempting certain property from execution, is a question of fact to be submitted to the jury. *Id.*
5. TERM "WAGON," IN EXEMPTION STATUTE, MEANS a common vehicle for the transportation of goods. *Quigley v. Gorham*, 139.
6. HACKNEY-COACH USED FOR CONVEYANCE OF PASSENGERS IS NOT "WAGON," within meaning of exemption statute. *Id.*
7. SCIRE FACIAS WOULD AFFORD NO ADEQUATE REMEDY AS MEANS OF INQUIRING into the manner in which a grant had been issued, as it only reaches such matter as appears upon the face or within the body of the grant. *Walker v. Wells*, 252.

See JUDGMENTS, 9; SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

1. NOTE EXECUTED TO ONE AS ADMINISTRATOR IS PRIMA FACIE ASSETS of the estate. *Jones v. Everman*, 521.
2. ADMINISTRATOR'S INDIVIDUAL DEBT IS NOT PRESUMED ADJUSTED ON EXECUTION OF NOTE TO HIM as administrator by his creditor. *Id.*
3. ADMINISTRATRIX MAY MAKE NOTE HER OWN, GIVEN TO HER AS ADMINISTRATRIX, and is presumed to have done so where she sues on it, with her husband, in her own right. *Id.*
4. ANTENUPTIAL PERSONAL DEBT OF ADMINISTRATRIX IS ADMISSIBLE SET-OFF in an action by her, in conjunction with her husband, in her personal right, on a note given to her as administratrix, and its effect can be avoided only by allegation and proof that the note is still assets of the estate. *Id.*
5. ADMINISTRATOR TAKES NO ESTATE, TITLE, OR INTEREST IN INTESTATE'S REALTY, in Illinois, but simply a power. *Smith v. McConnell*, 340.
6. ADMINISTRATOR CANNOT BRING POSSESSORY OR REAL ACTION, at law or in equity, in Illinois, for the recovery or maintenance of possession or title, or to clear up and vindicate title from clouds from adverse claims. *Id.*
7. CONVEYANCE BY ADMINISTRATOR WHICH DOES NOT PURPORT TO CONVEY any estate or interest except his own is ineffectual to pass the interest or estate of his intestate. *Davenport v. Young*, 320.
8. HEIR IS OWNER OF LANDS OF INTESTATE in Illinois, and is entitled to the rents and profits thereof, although they are subject to the payment of debts, and may be divested by decree and sale of the administrator. *Smith v. McConnell*, 340.
9. WHERE STATUTE AUTHORIZES SALE OF REAL ESTATE OF DECEDENT for the payment of his debts, a sale made by the administrator, without proving that there were any debts owing, is invalid, and conveys no title. *Davenport v. Young*, 320.
10. LEGISLATIVE ENACTMENTS MAY EMPOWER COURT to order a domestic administrator, having in his hands the distributive share of an estate belonging to minor children legally domiciled in a foreign state, to pay the same

over to the foreign guardian appointed for the minors in such state. *Grimmett v. Witherington*, 66.

See ACCOUNT, 2; EVIDENCE, 15; GUARDIAN AND WARD, 2; TRUSTS AND TRUSTEES, 4.

EXEMPLARY DAMAGES.

See DAMAGES, 5.

EXEMPTIONS.

See EXECUTIONS; HIGHWAYS; STATUTES, 7.

EXPECTANCY.

RELEASE BY HEIR APPARENT OF HIS ESTATE IN EXPECTANCY, with a covenant of non-claim, made fairly and with consent of his ancestor, precludes the releasor from afterward setting up a claim to any part of his ancestor's estate, either as heir or devisee. *Curtis v. Curtis*, 651.

FENCES.

1. ACT OF LEGISLATURE WHICH PROVIDES FORFEITURE OF ONE HUNDRED DOLLARS BY ALL RAILROADS neglecting to erect and maintain certain fences along their line of road, being a remedial act passed for the protection of property peculiarly exposed by the introduction of railroads, applies to corporations existing before its passage. *Norris v. Androscoggin Railroad Co.*, 621.
2. WHERE RAILROAD COMPANY NEGLECTS TO MAINTAIN PROPER FENCES AND ERECT CATTLE-GUARDS along the line of their road, as a matter of law there is that neglect which will render the corporation liable for injuries arising solely from that cause. *Id.*
3. WHERE RAILROAD IS REQUIRED TO INCLOSE ITS ROAD BY GOOD AND SUFFICIENT FENCE WHERE IT PASSES through improved lands, and it neglects to do so, and horses and other animals, in consequence of this omission, stray upon the track and are killed or injured by the engine or appendages, the company is liable in damages. This, although the engineer exercised due care. *Id.*
4. RAILROAD COMPANY BOUND TO KEEP FENCES ALONG ITS ROAD IN REPAIR, after a portion of the same has been down for several days, is presumed to have had notice of the fact. *Id.*
5. FACT THAT PLAINTIFF, IN ACTION AGAINST RAILROAD COMPANY FOR INJURIES TO HIS HORSE occasioned by their fence being out of repair, originally built the fence for them in an imperfect manner does not excuse them from liability. *Id.*

FERRIES.

See COMMON CARRIERS, 1, 3, 13, 26, 27.

FLOWAGE.

See CO-TENANCY, 2; RIPARIAN RIGHTS, 4; SERVITUDES, 2.

FOREIGN LAWS.

See EVIDENCE, 12, 14.

FRAUD.

See EVIDENCE, 2; NEGOTIABLE INSTRUMENTS, 8, 9, 12.

GARNISHMENT.

See ATTACHMENT.

GRANTS.

1. EVERY PERSON IS PRESUMED TO ASSENT TO GRANT made for his benefit, and a grant made to a person directly or for his use, without notice to him, is good until he disagrees thereto. *Wellborn v. Weaver*, 235.
2. MANNER IN WHICH GRANTS ARE MADE AND CERTIFIED IN ENGLAND, and the manner in which proceedings are conducted to set the same aside, recited. *Walker v. Wells*, 252.
3. GRANTS ARE ENROLLED IN OFFICE OF SECRETARY OF STATE IN GEORGIA, which office is an establishment distinct from any of the courts of that state, and belongs to an independent branch of the government. *Id.*
4. ENGLISH COURTS HAVE VERY SELDOM EXERCISED JURISDICTION TO CANCEL GRANTS. Under the practice followed in England in the issuing of grants, the exercise of such jurisdiction by them would be much more warranted than in the case of our American courts. *Id.*

See EXECUTIONS, 7.

GUARDIAN AND WARD.

1. IF FATHER IS DOMICILED AND DIES IN ONE STATE, and a guardian, lawfully entitled to the care and custody of his minor children, is there appointed for them, they cannot legally change their domicile to another state, so as to divest their guardian of their care and custody. *Grimmett v. Witherington*, 66.
2. IF MINOR CHILDREN OF DECEDED FATHER DOMICILED IN ANOTHER STATE AT TIME OF HIS DEATH remove from that state to another, and a foreign guardian is appointed in the latter for them, such foreign guardian, without proof that the minors were legally domiciled in the state to which they have removed, cannot recover their property from the domestic guardian, nor the distributive share of their father's estate from his administrators. *Id.*
3. FOREIGN TUTOR, APPOINTED BY COURT IN FOREIGN COUNTRY, which is the domicile of the ward, may, under the sanction of the court where the ward's property is situated, do acts in relation thereto which the interests of his ward require. *Succession of Lewis*, 600.

See EQUITY, 5; EXECUTORS AND ADMINISTRATORS, 10; INFANCY; SURETYSHIP, 4.

HIGHWAYS.

1. TOWN CANNOT MAINTAIN ACTION FOR INJURY TO HIGHWAY by destruction of a bridge which is a part thereof, the highway being one which it is bound to keep in repair, unless the town has repaired it, or incurred some expense or disbursement in consequence of such wrongful act. *Inhabitants of Freedom v. Weed*, 670.
2. MUNICIPAL CORPORATION IS LIABLE FOR NEGLIGENCE IN NOT REPAIRING STREETS, where a specific duty to repair is imposed and adequate powers

- and means to discharge the duty are provided. *Browning v. City of Springfield*, 345.
2. **TOWN IS LIABLE IN DAMAGES FOR INJURIES SUSTAINED BY TRAVELERS** using ordinary care in driving on a public highway, which such town is bound to keep in repair, when, by reason of snow-drifts, the part of the highway prepared for travel becomes impassable, and a passage-way outside and over the gutter of the road is used instead, by reason whereof the injury occurs. *Savage v. Bangor*, 658.
 4. **NOTICE OF DEFECT IN HIGHWAY IS NECESSARY TO CHARGE TOWN THEREWITH**, but actual notice is not absolutely necessary, as towns are bound to notice open and visible defects which could be prevented by common and ordinary diligence; and a thaw or rain occurring prior to an accident on a highway, rendered impassable by snow-drifts, is sufficient notice to the town that such highway is unsafe. *Id.*

HOMESTEADS.

1. **TO CONSTITUTE HOMESTEAD, UNDER IOWA ACT OF 1849 EXEMPTING HOMESTEAD** from forced sale, there must have been both ownership and occupation of the premises during the existence of that law. *Charles v. Lawberson*, 456.
2. **OCCUPATION REQUIRED TO CONSTITUTE HOMESTEAD** must be something more than a constructive possession, or than such possession as arises when land is cultivated, or is being fenced and improved. The premises become a homestead when they are used for the purpose designed by the law, that is, as a home for the family, and not before. *Id.*
3. **INTENTION OF OWNER OF LAND TO MAKE IT HIS HOMESTEAD**, formed while the homestead act of 1849 was in force, and carried into effect by moving on to the premises after the repeal of that act, is not sufficient to exempt the property as a homestead. *Id.*
4. **HOMESTEAD STATUTE DOES NOT CONTEMPLATE THAT HOMESTEADS BE CARVED** out of land held in joint tenancy or tenancy in common, when it provides no mode for their separation and ascertainment. *Wolf v. Fleischacker*, 121.

HOMICIDE.

See CRIMINAL LAW, 2, 3; JURY AND JURORS, 3; VERDICT, 5; WITNESSES, 3, 9.

HUSBAND AND WIFE.

1. **HALF-INTEREST IN COMMUNITY PROPERTY, UNDER CALIFORNIA STATUTE,** is a substitute for the common-law right of dower. *Beard v. Knox*, 125.
2. **HUSBAND AND WIFE, DURING COVERTURE, ARE JOINTLY SEIZED OF COMMUNITY PROPERTY** in California, the wife's half-interest being subject only to the husband's disposal during their joint lives. *Id.*
3. **WIFE RESIDING WITHIN STATE HAS NO GREATER PRIVILEGES RESPECTING COMMUNITY PROPERTY** than one residing without state, under the California statute. *Id.*
4. **ALL OF PROFITS AND INCOME OF TRUST ESTATE** settled jointly upon husband and wife belong to the husband as a compensation for his liability to support the wife. *Sanderson v. Jones*, 217.
5. **HUSBAND HAS POWER TO ALIENATE HIS LIFE INTEREST** in property settled

jointly upon himself and wife for life, remainder to their children, where the possession has been delivered to him by the trustee. The children would have their remedy against the purchaser by bill *quia timet* when their interest matured. *Id.*

6. WOMAN'S RIGHT TO SUE FOR CERTAIN SLAVES, AND HER PROPERTY THEREIN, UPON HER MARRIAGE, passes to her husband, and he alone can sue for their recovery. In such a case the statute of limitations begins to run against the woman from the accrual of her right, and against the husband from the date of his marriage. *Wellborn v. Weaver*, 235.
7. HUSBAND CANNOT, BY DEVISE OR WILL, DEFEAT WIFE'S RIGHT TO OWN HALF OF COMMUNITY PROPERTY under California statute, which gives the husband entire control of the community property, with absolute power to dispose of it, but provides that upon the dissolution of the community, by the death of either husband or wife, one half the community property shall go to the survivor. *Beard v. Knox*, 125.
8. WIFE, BY ACCEPTING LEGACY UNDER HUSBAND's WILL, which assumes to dispose of the whole community property, is not estopped from setting up her claim to one half the property. She is entitled to her own share of the common property, and to the legacy out of her husband's share. *Id.*
9. WHERE HUSBAND COMPELS WIFE WITHOUT HER FAULT TO LIVE SEPARATE FROM HIM permanently, either by abandoning her or forcing her to leave him, and fails to make suitable provision for her support, she may acquire property, control her person and acquisitions, contract, sue and be sued in relation to them as a *feme sole*, during the continuance of such condition. *Love v. Moynihan*, 306.
10. MARYLAND ACT OF 1841, CHAPTER 161, DOES NOT DEPRIVE HUSBAND OF LIFE ESTATE in his wife's lands, but merely prohibits the sale of the property under judgments during her life-time, leaving the judgment liens upon his estate subject to stay of execution until the death of the wife. *Anderson v. Tydings*, 708.

See DOMICILE, 1; MARRIAGE AND DIVORCE; MARRIED WOMEN.

INDEMNITY.

See SURETYSHIP.

INDICTMENT.

See CRIMINAL LAW, 1, 5, 6.

INFANCY.

SERVICE OF PROCESS ON INFANTS IS UNNECESSARY WHERE THEY APPEAR and petition to be made parties, and a guardian *ad litem* is appointed for them. *Burch v. Breckinridge*, 553.

See DOMICILE, 2, 3; EXECUTORS AND ADMINISTRATORS, 10; GUARDIAN AND WARD, 1-3.

INJUNCTIONS.

I. COURT OF COMMON PLEAS OF INDIANA HAS JURISDICTION TO GRANT INJUNCTION against the prosecution of a trade by certain persons in a certain place in violation of a contract. *Beard v. Dennis*, 380.

2. INJUNCTION WILL LIE TO PREVENT VIOLATION OF CONTRACT IN REASONABLE RESTRAINT OF TRADE; and, it seems, specific performance of such contract may be decreed. *Id.*
 3. INJUNCTION AGAINST PROSECUTION OF TRADE MAY BE GRANTED AT SUIT OF ONE ONLY OF SEVERAL PARTNERS with whom the contract was made, where an injunction simply, and not compensation or damages, is asked. *Id.*
 4. ONE HAS RIGHT TO HAVE HIS TITLE TO LAND PROTECTED from a sale that might create a cloud upon it; and an injunction will be granted to protect such right. *Guy v. Hermance*, 85.
 5. INJUNCTION—DEFECT OF TITLE TO PART OF REAL ESTATE SOLD, and inability of vendor, through insolvency, to respond to damages recoverable by vendee, are sufficient grounds for an injunction restraining the collection of promissory notes given for part of the purchase price. *Yonge and Bryan v. McCormick*, 214.
 6. IN APPLICATION FOR INJUNCTION AFTER ANSWER FILED, every matter in the bill which the defendant has failed to answer to, which he could have answered directly, is to be presumed against him; and the court will consider only those parts which are responsive to the bill. *Id.*
 7. ADJUDICATIONS AS TO MOTIONS TO DISSOLVE INJUNCTIONS ARE TO BE TAKEN AS AUTHORITY in cases of applications for injunctions after answer, as no substantial difference is perceived to exist between them. *Id.*
 8. UPON CONSIDERING APPLICATION FOR INJUNCTION, COURT WILL NOT DECIDE points which will come up for consideration at the final hearing of the bill. *Id.*
 9. WHETHER ISSUING OF INJUNCTION REQUIRES BOND OR NOT DEPENDS UPON DISCRETION of the judge who orders it. *White v. Davidson*, 699.
 10. GRANTING OR CONTINUING OF INJUNCTIONS rests in the sound discretion of the court, to be governed by the nature of the case, and an injunction may be continued, although the answer, in terms, denies all the circumstances upon which the equity of the bill is founded. *Allen v. Hawley*, 198.
 11. BILL FOR INJUNCTION HAVING BEEN IMPROPERLY RETAINED, WILL NOT BE FURTHER RETAINED for the purpose of granting other relief for which there is a remedy at law. *Printup v. Mitchell*, 258.
- See CONSTITUTIONAL LAW, 26; JUDGMENTS, 11; PARTNERSHIP, 8; PLEADING AND PRACTICE, 14; WASTE, 2.

INNKEEPERS.

1. INNKEEPER IS BOUND TO KEEP SAFELY AND WELL PROPERTY OF GUESTS, and in case of loss or injury he can only absolve himself from liability on his part by showing that the loss or injury was without his fault. The burden of proof is upon him. If, however, the guest unnecessarily exposes his property or money to danger, or unnecessarily carries with him large sums of money, the rule might be otherwise. *Johnson v. Richardson*, 369.
2. GUEST OF HOTEL IS NOT REQUIRED TO PLACE HIS VALUABLES IN CUSTODY OF INNKEEPER, even though the innkeeper has an iron safe for that purpose, and the guest knew of that fact. *Id.*

INSANITY.

1. SANITY OR INSANITY OF PRISONER IS MATTER OF FACT FOR JURY. The admissibility of evidence to establish insanity is a matter of law for the judge. *State v. Patten*, 594.
2. USUALLY DEFENDANT IN CRIMINAL ACTION CAN CONTROL OR DISCHARGE HIS COUNSEL; but if the sanity of the defendant is in issue, the court should allow evidence on that point, even though against defendant's will, when offered by his counsel. *Id.*
3. IT IS ERROR FOR COURT TO DISCHARGE COUNSEL OF DEFENDANT, in a criminal action, at the defendant's demand, and submit his case to the jury upon the evidence of the state, when counsel offers to show by the testimony of witnesses that at, before, and since the time of the commission of the act the prisoner was insane. *Id.*

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

1. INSTRUCTIONS ON MATTERS IMMATERIAL TO ISSUE, though wrong, are of no avail to a party excepting. *Whidden v. Seelye*, 661.
2. WHERE LIMITATIONS AND NON ASSUMPTION ARE BOTH PLEADED, a prayer for instructions which overlooks the evidence offered under the plea of limitations and directs the jury to find for the plaintiff, notwithstanding they may find the debt barred by the statute, is fatally defective in not limiting the finding of the jury to the plea of non assumption. *Hurst v. Hill*, 705.
3. IT IS DUTY OF JUDGE TO DECLARE TO JURY WHAT LAW IS, with its exceptions and qualifications, and then state hypothetically that if certain facts which constitute the offense are proved to their satisfaction they will find the defendant guilty, otherwise they will acquit him. *Keener v. State*, 269.
4. JUDGMENT FOR DEFENDANT ON PLEA OF NON ASSUMPTION will not be reversed on appeal by the plaintiff for any error in an instruction in reference to the plea of limitations. *Hurst v. Hill*, 705.

See CONSTITUTIONAL LAW, 10; CRIMINAL LAW, 2; JURY AND JURORS, 3; NEGLIGENCE, 2; NEW TRIAL, 1; SHIPPING, 5.

INSURANCE.

1. PAYMENT TO OWNER BY INSURANCE COMPANY OF AMOUNT OF HIS LOSS DOES NOT BAR the right against another party originally liable for the loss, but the owner, by receiving payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name. *Rockingham Mutual Fire Ins. Co. v. Bosher*, 618.
2. NO ACTION LIES BY INSURANCE COMPANY, IN ITS OWN NAME, AGAINST THIRD PERSON, who willfully burns up property insured by it, to recover the amount of money which it was thereby occasioned to pay to the insured. *Id.*
3. POLICY OF INSURANCE IS, AFTER LOSS HAS HAPPENED, ASSIGNABLE like any other debt, although such policy contains a provision that it shall

not be assignable without the consent of the company expressed by endorsement made thereon. *Walters v. Washington Ins. Co.*, 451.

4. ABANDONMENT OF INSURED VESSEL IS NOT NECESSARY, where sale is made on account of injury, to enable assured to recover for a total loss. *Prince v. Ocean Ins. Co.*, 676.

INTEREST.

1. INTEREST IS TO BE COMPUTED FROM DATE, AND NOT MATURITY, of a promissory note which contains a stipulation, if not paid when due, to bear interest at a certain rate. *Horn v. Nash*, 437.
2. AGENT WITH WHOM MONEY IS LEFT AS DEPOSIT FOR DEFINITE OWNER is bound to pay to such owner the interest that he receives for the use of it while it is under his control. *Bassett v. Kinney*, 161.

See CONTRACTS, 8.

JETTISON.

See COMMON CARRIERS, 21-25; PLEADING AND PRACTICE, 17; SHIPPING, 10-12; WITNESSES, 5.

JUDGMENTS.

1. JUDGMENT ON MERITS, IN ACTION OF TORT for false representations as to soundness of a horse, is a bar to a subsequent action of contract on the same transaction, founded on a promise of soundness of the horse. *Norton v. Doherty*, 758.
2. FORMER JUDGMENT IN ACTION OF TRESPASS AGAINST DEFENDANT'S PRINCIPAL may be pleaded in bar to an action against defendant, as agent, for the same acts of trespass. *Emery v. Fowler*, 627.
3. TECHNICAL RULE, THAT FORMER JUDGMENT CAN ONLY BE PLEADED IN BAR between parties to the record or their privies, expands so far as to admit of its being so pleaded when the same question has been decided and judgment rendered between parties responsible for the acts of others. *Id.*
4. FORMER JUDGMENT MAY BE INTRODUCED IN EVIDENCE UNDER GENERAL ISSUE, when such judgment was rendered subsequent to the entry of such plea of the general issue. *Id.*
5. PAROL EVIDENCE IS ADMISSIBLE UPON TRIAL OF ACTION OF TRESPASS to show that the same acts of alleged trespass had been directly put in issue, and that a decision upon them had been made in a former suit in a trial upon the merits. *Id.*
6. JUDGMENT CANNOT BE COLLATERALLY IMPEACHED by a party on the ground that false testimony was given at the trial. *Dilling v. Murray*, 385.
7. JUDGMENT OF JUSTICE OF PEACE IS SUFFICIENTLY CERTAIN AND DEFINITE where, after stating the names of the parties, the cause of action, the amount claimed, the manner in which the cause came before him, and the meeting of the parties by their counsel, it sets forth that "after hearing all the testimony on both sides, it is believed that the plaintiff is entitled to seventy-five dollars debt, and cost of suit, which is taxed as follows." *Stowers v. Milledge*, 434.
8. DISCLAIMER OF INTEREST IN LAND, MADE BY PARTY AFTER JUDGMENTS have been rendered against him, does not destroy the liens of such judgments upon the legal right which he had in the land at the time when the judgments were rendered. *Anderson v. Tydings*, 708.

9. JUDGMENT, WITH STAY OF EXECUTION UNTIL HAPPENING OF CONTINGENCY, or until a future specified time, is a lien upon the real estate of the defendant during the stay. *Id.*
10. LIEN OF JUDGMENT IS NOT LOST OR SUSPENDED even during continuance of an injunction, although the injunction stops the execution. *Id.*
11. IN ACTION ON JUDGMENT OF SISTER STATE, DEFENDANT MAY DENY AUTHORITY OF ATTORNEY who appeared for him in the original action. *Baltzell v. Noeler*, 466.
12. WHERE RECORD OF JUDGMENT SHOWS THAT SUMMONS WAS ISSUED in the case under the seal of the court of a sister state, and returned "served" by an officer, who, it appears, was sheriff of the county, the courts of Iowa will not, in an action on such judgment, inquire into the sufficiency of such return, when no evidence to contradict it is offered by the defendant. The question whether that return was sufficient evidence of service under the laws of the state where the judgment was rendered might be raised in the appellate court of that state, but not here, merely upon the record, without further or other proof. *Latterell v. Cook*, 428.
13. JUDGE'S CERTIFICATE TO TRANSCRIPT OF JUDGMENT OF ANOTHER STATE, signed by "a presiding judge," or by "one of the judges," is sufficient under section 2348 of the Iowa code. *Id.*

See COMMON CARRIERS, 25; HUSBAND AND WIFE, 10; JUDICIAL SALES, 3, 4; MORTGAGES, 16; PLEADING AND PRACTICE, 37.

JUDICIAL SALES.

1. PURCHASER AT SHERIFF'S SALE MUST PAY OR TENDER PURCHASE MONEY WITHIN REASONABLE TIME in order to acquire title. *Conklin v. Smith*, 416.
2. PURCHASER AT SHERIFF'S SALE IS ESTOPPED FROM SETTING UP HIS CLAIM by taking a mortgage on the land, he not having paid or tendered to the sheriff the purchase money and received a deed. *Id.*
3. MISRECTAL OF JUDGMENT IN SHERIFF'S DEED WILL NOT VITIATE OR DESTROY TITLE. *Phillips v. Coffee*, 357.
4. DEFECTS OR IRREGULARITIES IN SHERIFF'S RETURN WILL NOT DEFEAT TITLE OF PURCHASER who is not the plaintiff in execution, and who receives a good deed. The purchaser depends upon the judgment, levy, and deed, and all other questions are between the parties to the judgment and the officer. *Id.*
5. ACTION FOR MONEY HAD AND RECEIVED WILL NOT LIE TO RECOVER RENT paid by a tenant to one who did not acquire title under his bid at a sheriff's sale of the land, or was estopped from setting it up. *Conklin v. Smith*, 416.

JURISDICTION.

1. JUSTICES OF PEACE HAVING JURISDICTION OVER INJURIES TO PERSONALTY ONLY have no jurisdiction to try cause for damages from diversion of water from a natural or artificial channel. *Hill v. Newman*, 140.
2. COURTS CANNOT ACQUIRE JURISDICTION BY PROCESS OF SCIRE FAULAS over disputed questions relative to grants. *Scire factae* is always founded upon a record, and issues from and is made returnable to the court where the record is kept. *Walker v. Wells*, 252.
3. COURTS HAVE NO JURISDICTION OF BILL to set aside a patent, which bill alleges that the complainants are the heirs of a certain person who "gave

in for a draw" at a land lottery; that their devisor's name was improperly written; that a third person procured a grant to himself through the use of their devisor's name; and that the defendant had since purchased the land thereby acquired at sheriff's sale. This although defendant had purchased it with full knowledge of these facts. *Id.*

See BANKRUPTCY AND INSOLVENCY, 1; CONSTITUTIONAL LAW, 14, 17, 24; COURTS; EQUITY; INJUNCTIONS, 1; NUISANCES, 5; TROVER, 2; WRIT OF ERROR.

JURY AND JURORS.

1. OMISSION TO CHALLENGE JUROR AT TIME HE IS IMPANNELED is a waiver of any objection to him, and his competency cannot afterward be questioned by the party making such omission. This doctrine applies to both civil and criminal cases. *Keener v. State*, 269.
2. IT IS NOT FOR COURT TO REFUSE TO ALLOW JUROR TO BE SWORN because he states that he has formed an opinion as to the guilt of the defendant, if such juror is accepted by the prisoner and is not challenged by the people. *Van Blaricom v. People*, 316.
3. JURY, IN CASE OF HOMICIDE, are the judges of both the law and the fact, and no law which they are entitled to consider should be withheld from them by the court in its charge. *Keener v. State*, 269.
4. AFFIDAVITS OF JURORS WILL NOT BE RECEIVED TO IMPEACH THEIR VERDICT, but will be received to substantiate it. *Wilson v. Berryman*, 78.
5. AFFIDAVIT OF JUROR, SWORN TO BE CORRECT BY ANOTHER PARTY, is equivalent to the latter's original affidavit. *Id.*

See ALTERATION OF INSTRUMENTS; COMMON CARRIERS, 4; CRIMINAL LAW, 2; EVIDENCE, 5; EXECUTIONS, 4; INSANITY, 1; INSTRUCTIONS; VERDICT.

JUSTICES OF THE PEACE.

See BANKRUPTCY AND INSOLVENCY, 1; CONSTITUTIONAL LAW, 14, 17; JUDGMENTS, 7; JURISDICTION, 1; OFFICE AND OFFICERS, 1, 2; PLEADING AND PRACTICE, 27; PROCESS, 1; TRESPASS, 2.

LARCENY.

See CRIMINAL LAW.

LATENT AMBIGUITY.

See EVIDENCE, 2.

LIBEL.

See SLANDER.

LIENS.

See BAILEMENTS, 1, 2; HUSBAND AND WIFE, 10; JUDGMENTS, 8-10; PARTNERSHIP, 2.

LIQUOR LAWS.

See CONSTITUTIONAL LAW, 2, 3, 7, 8, 12, 22; CRIMINAL LAW, 6; STATUTES, 2.

MANDAMUS.

1. MANDAMUS WILL NOT LIE TO RESTORE MINISTER TO HIS CLERICAL RIGHTS AND FUNCTIONS where he has been wrongfully excluded therefrom by

the trustees and congregation of the church, if he has no temporal right in such office, and there are no fees or emoluments attached thereto and dependent on its exercise, other than voluntary contributions. *Union Church of Africans v. Sanders*, 187.

2. **MANDAMUS LIES FOR ENFORCEMENT OF LEGAL RIGHTS ONLY**, and not for those of a purely equitable character, nor for those of a mere spiritual or ecclesiastical nature. *Id.*
3. **OFFICE OF MINISTER IS MERELY SPIRITUAL OR ECCLESIASTICAL OFFICE**, where no temporal right, such as the enjoyment of an endowment or emolument, is attached thereto; and the wrongful exclusion from such an office does not involve any legal right of which a court of law can take jurisdiction. But if any temporal right is attached to the office and is affected by such exclusion, a legal right is involved; and if the law affords no specific remedy therefor, mandamus will lie to restore him to his office and its functions. *Id.*

See **WAIVER OF ERROR**.

MARRIAGE AND DIVORCE.

1. **TEMPORARY ALIMONY**.—A husband, in an action for divorce, will not be allowed to prove that the wife practiced a fraud upon him in the marriage, to avoid supplying her with temporary alimony and a sufficient sum to pay her attorney's fees. *Fritch v. Fritch*, 289.
2. **MUTUAL PROMISES TO MARRY ARE ESSENTIAL** to sustain an action for breach of promise of marriage. *Burnham v. Cornwell*, 529.
3. **PLAINTIFF'S DECLARATION OF WILLINGNESS TO MARRY DEFENDANT, IN BREACH OF PROMISE** suit, made to a third person in the defendant's absence, is not evidence to prove a promise by the defendant. *Id.*
4. **DIRECT EVIDENCE OF EXPRESS PROMISE TO MARRY IS UNNECESSARY** in a suit for breach of such promise, but it may be proved by the unequivocal conduct of the parties, and by a general yet definite understanding between them and their relatives, corroborated by their actions. *Id.*
5. **EVIDENCE OF COURTSHIP BY DEFENDANT IN BREACH OF PROMISE SUIT**, that is, of a course of particular attentions and visits to plaintiff, is not sufficient to show a promise of marriage, but the circumstances must be such as to show that there was a serious promise and acceptance. *Id.*
6. **EXPRESSION TO THIRD PERSON OF INTENTION TO MARRY** is not a promise to marry, though, with other facts, it may be evidence of a promise. *Id.*
7. **OFFER OF PERFORMANCE OF PROMISE TO MARRY BY PLAINTIFF** must be shown to sustain an action for breach of a promise to marry, generally, or in a reasonable time. *Id.*
8. **PROMISE OF MARRIAGE WITHIN YEAR BEFORE SUIT CANNOT BE INFERRED FROM ATTENTIONS**, such as are usually paid by gentlemen offering matrimony to ladies, continued to within one year. *Id.*

See **HUSBAND AND WIFE**.

MARRIED WOMEN.

1. **WIFE'S SEPARATE ESTATE IS NOT SUCH TRUST ESTATE** as is contemplated by the Kentucky statute of 1796 subjecting trust estates to the payment of debts. *Burch v. Breckinridge*, 553.
2. **WIFE CANNOT BIND SEPARATE ESTATE BY GENERAL PERSONAL ENGAGEMENTS** not indicating any intent specifically to charge such estate. *Id.*
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3. **WIFE MAY CHARGE SEPARATE ESTATE IN EQUITY IF SHE MANIFESTS INTENT** to do so, but not otherwise. *Id.*
4. **NOTE OR BOND BY WIFE BINDS SEPARATE ESTATE**, in Kentucky, though the estate is not referred to, the execution of such instruments being regarded as a sufficient manifestation of an intent to charge the estate. *Id.*
5. **WIFE'S SEPARATE REAL ESTATE CANNOT BE CHARGED BY VERBAL CONTRACTS** on her part, but it is otherwise as to separate personal estate. *Id.*
6. **WIFE'S VERBAL CONTRACT DOES NOT BIND SEPARATE PERSONAL ESTATE** unless made under circumstances showing an understanding between the parties that the separate estate should be liable, and in such case the charge will be limited to that part of the estate which it appears was intended to be made liable. *Id.*
7. **AGREEMENT BY WIFE'S TRUSTEE THAT SEPARATE ESTATE SHALL BE LIABLE** for her debts is not sufficient, but it can be charged only by her own contract. *Id.*
8. **WIFE'S CONSENT TO CHARGE SEPARATE ESTATE** with her debts may be inferred where she knew her creditors looked to it for payment, and continued to deal with them with such knowledge. *Id.*
9. **WIFE'S DEBTS FOR CURRENT EXPENSES ARE CHARGEABLE ONLY ON INCOME OF SEPARATE ESTATE**, and not on the capital, even where an intent to charge the separate property is presumed, unless there is an express agreement to charge the principal of the estate; so, although the debts far exceed the income. *Id.*
10. **DEBT DUE FROM WIFE TO HER TRUSTEE WILL BE POSTPONED** in order of payment, out of the income of her separate estate, to the debts due other creditors, where the trustee has been guilty of great indiscretion in creating debts against the estate exceeding its profits, under circumstances tending to mislead the *cestui que trust*. *Id.*
11. **WRITING IS NECESSARY TO CHARGE FUTURE PROFITS OF SEPARATE REAL ESTATE** of a *feme covert* with her debts, because a disposition of such profits by anticipation is substantially a disposition of the *corpus* of the estate. *Id.*
12. **SEPARATE ESTATE IS NOT CREATED TO WIFE** in a marriage settlement executed by herself and husband in trust, by the words "to the use, benefit, and behoof of himself and wife." *Sanderson v. Jones*, 217.
13. **TO CREATE SEPARATE ESTATE, MORE STRINGENT EXPRESSIONS** would seem to be required by later authorities than formerly. *Id.*
14. **SAVING IN STATUTE OF LIMITATIONS IN FAVOR OF MARRIED WOMEN DOES NOT APPLY** where the woman was unmarried at the time the right accrued, although she may have married afterwards on the same day. *Wellborn v. Weaver*, 235.

See HUSBAND AND WIFE; WRIT OF ENTRY.

MASTER AND SERVANT.

1. **PRINCIPLE WHICH MAKES MASTER LIABLE FOR TORTIOUS ACT OF SERVANT** done in the performance of the master's business, within the scope of the general authority conferred, is the same as that which makes him liable for the act of his servant done by his express direction given at the time; but the remedy in the former case is by an action on the case founded upon the negligence of the servant, while in the latter case the

- remedy is by an action of trespass founded, not upon the relationship of master and servant existing between them, but upon the fact that the act was done by his express direction and command, and is therefore in reality as well as in law his own act. *Thames Steamboat Co. v. Houstonian R. R. Co.*, 154.
2. PERSON CANNOT BE MADE TRESPASSE AGAINST HIS WILL, but he may be made liable in an action on the case for the negligence of his servant, though such negligence be contrary to his wishes. *Id.*
 3. MASTER IS NOT LIABLE IN TRESPASS FOR TORTIOUS ACT OF HIS SERVANT unless such act was by him ordered, directed, or authorized to be done, or is the natural or necessary consequence of something ordered to be done. *Id.*
 4. WHERE SERVANT EMPLOYED TO WATCH BUILDING OF TRIFLING VALUE, on a wharf, unnecessarily cuts adrift from the wharf a valuable steamboat, on discovering that she is on fire, and the vessel floats out of reach and is burned, the master is not liable in an action of trespass for her destruction, in the absence of any proof that such watchman was ordered or directed by him to cut the vessel's cables. *Id.*
 5. RAILROAD COMPANY IS LIABLE FOR INJURY caused by the negligence of its servants. *Black v. Carrollton R. R. Co.*, 586.
 6. RELATION OF MASTER AND SERVANT DOES NOT EXIST between owner of land and a carpenter, over whom he has no direction or control, whom he employs to alter and repair certain buildings and furnish the materials therefor, for a specified price; their relation is that of employer and contractor, and such land-owner is therefore not liable for damage resulting to a third person, from the deposit, by a teamster employed by such carpenter, of boards intended to be used in such alterations and repairs in the highway in front of such land. *Hilliard v. Richardson*, 743.

MEASURE OF DAMAGES.

See DAMAGES.

MERGER.

See MORTGAGES, 15.

MINERAL LANDS.

1. POLICY OF BOTH GENERAL AND STATE GOVERNMENTS IS TO RESERVE public lands containing precious metals from settlement for agricultural purposes. *McClintock v. Bryden*, 87.
2. ENTRY FOR PURPOSE OF MINING UPON PUBLIC LANDS ALREADY SETTLED upon for agricultural purposes is not tortious. *Id.*
3. SETTLER FOR AGRICULTURAL PURPOSES UPON MINING LANDS OF CALIFORNIA is subject to the rights of miners, who may proceed in good faith to extract any valuable metals found there in the most practicable manner and with the least injury to the occupying claimant. *Id.*
4. MINER MUST TAKE GROUND HE SELECTS AS HE FINDS IT, subject to prior rights which have an equal equity on account of an equal recognition from the sovereign power. *Irvine v. Phillips*, 113.
5. RIGHT TO MINE AND TO DIVERT STREAMS FOR THIS PURPOSE stand on equal footing, and when they conflict, must be decided by the fact of priority. *Id.*

MINES.

See MINERAL LANDS; NUISANCES, 2.

MISTAKE.

See CONTRACTS, 2; DEBTOR AND CREDITOR, 2, 3; DEEDS, 23; EQUITY, 1-8; EVIDENCE, 4; NEGOTIABLE INSTRUMENTS, 12.

MORTGAGES.

1. MORTGAGE UNSATISFIED UPON RECORD IS SUBJECT OF SALE TO ALL INNOCENT PARTIES. *Peters v. Jamestown Bridge Co.*, 134.
2. PURCHASER OF MORTGAGE CANNOT BE CHARGED WITH CONSTRUCTIVE NOTICE of anything subsequent to the mortgage except its assignment or satisfaction duly entered of record. *Id.*
3. FEE-SIMPLE, WARRANTY DEED OF MORTGAGED PREMISES from mortgagor to a third person cannot operate as an assignment of the mortgage. *Id.*
4. MORTGAGE IS MERE SECURITY FOR DEBT, and cannot pass without a transfer of the debt. *Id.*
5. MORTGAGEE MAY DO SUCH ACTS IN RESPECT TO MORTGAGE DEBT as may usually be done in relation to money transactions, verbally or by writing, without regard to the mortgage security. *Ryan v. Dunlap*, 334.
6. MORTGAGE IS DISCHARGED BY VERBAL OR WRITTEN DISCHARGE OF DEBT BY PAYMENT, without a release or satisfaction entered upon the mortgage itself or in the margin of the record. *Id.*
7. DEED AND MORTGAGE BACK, ALTHOUGH BEARING DIFFERENT DATES, IF DELIVERED AT SAME TIME, constitute but one transaction. Consequently the deed and mortgage must stand or fall together; they cannot be void in part and good in part. *Newbegin v. Langley*, 612.
8. MORTGAGE IS NOT VOID FOR WANT OF POSSESSION TAKEN by the mortgagor, where, immediately after its execution, the mortgagor and mortgagée form a partnership which takes possession of the property and with its avails pays company debts. After the company takes possession, in such a case, there is no possession left in the mortgagor upon which to raise a presumption of fraud, under the general statute of fraudulent conveyances. *Utey v. Smith*, 163.
9. DEBT SECURED BY MORTGAGE IS SUFFICIENTLY DESCRIBED BY THESE WORDS in the condition of the deed: "Whereas the said S., at my request and for my sole accommodation, has agreed to indorse my own negotiable paper, and business paper received by me from others and afterwards by me negotiated, to be made within two years from the date hereof, and also to become my security on other paper from time to time, the whole not exceeding in amount the sum of sixteen thousand dollars at any given time within said two years, and all to be discounted by, or received by, and payable to" certain banks, "and payable at said banks, or any one or more of them, or otherwise; and the said S. has also indorsed for me and become my security on sundry promissory notes, bills of exchange, and other negotiable paper which has not yet come to maturity, a part whereof is due to or payable at one or more of the said banks, and some part thereof in other places not remembered, the whole amounting to about sixteen thousand dollars." *Id.*
10. MORTGAGOR SUFFERED TO REMAIN IN POSSESSION OF MORTGAGED PREMISES.

he is not accountable to any one for the rents and profits thereof.
Harrison v. Wyse, 151.

11. MORTGAGEE WHO TAKES POSSESSION AND RECEIVES RENTS AND PROFITS of the mortgaged premises becomes accountable for them, and is bound to apply the net proceeds in reduction of his debt. *Id.*
 12. WHEN SECOND MORTGAGEE APPLIES TO REDEEM PRIOR MORTGAGE, he stands in the same situation as the mortgagor, and is entitled to the benefit of all payments made by him, and of all rents received by the prior mortgagee, and is not bound to pay any greater sum than the mortgagor would have had to pay if the application had been made by him. *Id.*
 13. MERE PURCHASE OF EQUITY OF REDEMPTION BY PRIOR MORTGAGOR in possession, receiving the rents and profits of the mortgaged premises, does not, so far as the subsequent mortgagees is concerned, change the position of such prior mortgagee, or his accountability for the rents and profits received after the purchase, but he is considered as continuing in possession in the same manner as when his occupancy commenced. *Id.*
 14. WHETHER MERGER OF EQUITY OF REDEMPTION into the legal estate occurs when they meet in one person depends upon the intention of that person, and the estates are not merged if he does not so intend. *Knowles v. Lawton*, 290.
 15. DOCTRINE OF MERGER.—WHEN ASSIGNMENT OF MORTGAGE IN PROCESS OF FORECLOSURE IS TAKEN by the holder of the equity of redemption, and he goes on and prosecutes the foreclosure suit to judgment and sells the premises, it is presumed from such act that he does not intend to have the equity of redemption merge in the legal estate, and therefore such merger will not take place. *Id.*
 16. PURCHASER OF MORTGAGED PREMISES IS BOUND BY JUDGMENT of foreclosure rendered against the mortgagor, although he, the purchaser, is not made a party to the suit. *Id.*
 17. PURCHASERS OF DIFFERENT PARTS OF PREMISES COVERED BY MORTGAGE cannot compel the holder of the mortgage to exhaust the portion left in the hands of the mortgagor first; nor the portions sold, in the inverse order of the sales; but the holder of the mortgage may proceed against any portion he chooses. *Id.*
- See** BANKRUPTCY AND INSOLVENCY, 2; BANKS AND BANKING, 1, 2; CORPORATIONS; COUNTIES; HIGHWAYS, 1-4; JUDICIAL SALES, 2; NEGOTIABLE INSTRUMENTS, 15; TROVER, 1; WRIT OF ENTRY, 1.

NAVIGATION.

See SOVEREIGNTY, 4, 5; WITNESSES, 4.

NEGLIGENCE.

1. APOTHECARIES AND SURGEONS ARE RESPONSIBLE ONLY FOR INJURIES RESULTING from a want of ordinary care and skill. The highest degree of skill is not required of them. *Simonds v. Henry*, 611.
2. SKILL REQUIRED OF DENTIST.—An instruction in an action by a dentist for the price of some work, which the defendant complained of as defective, "that if the plaintiff has used all the knowledge and skill to which the art had at the time advanced, that would be all that would be required

of him," etc., is erroneous, as requiring the possession of more than ordinary care and skill by him. *Id.*

See COMMON CARRIERS; MASTER AND SERVANT, 1, 2

NEGOTIABLE INSTRUMENTS.

1. CERTIFICATE OF DEPOSIT IS NEGOTIABLE INSTRUMENT where it is made payable to the depositor or his order at a specified time after date, with interest. *Brown v. Briggs*, 464.
2. PAYEE OF CERTIFICATE OF DEPOSIT, WHO TRANSFERS IT BY BLANK INDORSEMENT, is liable on his indorsement. *Id.*
3. BLANK INDORSEMENT CREATES SAME LIABILITY FROM INDORSEE to indorsee as if it was full. *Id.*
4. POSSESSION OF PROMISSORY NOTE INDORSED IN BLANK IS PRIMA FACIE EVIDENCE OF TITLE, and evidence is not admissible at the trial, in an action thereon, to prove that plaintiff never owned the note, nor paid anything for it, nor employed counsel to prosecute the action, nor had any interest in the suit, if the signature, indorsement, or delivery of the note are not denied in the answer. *Way v. Richardson*, 760.
5. POSSESSION IS PRIMA FACIE EVIDENCE OF TITLE TO NOTE made payable to person named, or bearer, in an action by a person who is not the payee named, but is the general agent of the payee who is alleged in the answer to be the owner of the note. *Petree v. Proulx*, 778.
6. BEARER OF NOTE PAYABLE TO PAYEE NAMED OR BEARER, who takes it before maturity, holds it free from any equities or set-off the maker may have against the payee named. *Id.*
7. DELIVERY OF NOTE WITH BLANK INDORSEMENT VESTS RIGHT in the holder to collect it or negotiate it, or to fill up the indorsement with his own name as indorser. *Caruth v. Thompson*, 559.
8. BONA FIDE HOLDER FOR VALUE, OF NOTE INDORSED IN BLANK AND FRAUDULENTLY TRANSFERRED by a bailee, is entitled to hold the same against the true owner and to recover the amount thereof. *Id.*
9. OWNER OF NOTE INDORSED IN BLANK, FRAUDULENTLY TRANSFERRED BY BAILEE, MAY MAINTAIN BILL against the maker enjoining him from payment until it can be ascertained in whose hands it is, and requiring him to answer as to its whereabouts, and may, it seems, in a proper case, have judgment against him for the amount upon indemnifying him against another action. *Id.*
10. IN DEFENSE TO ACTION ON PROMISSORY NOTE, IT IS NOT SUFFICIENT TO PLEAD, in general terms, want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. *Gushee v. Leavitt*, 116.
11. PLEA IS BAD WHICH ALLEGES THAT NOTE SUED on is property of another than the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner which could not be set up against the plaintiff. *Id.*
12. PAROL TESTIMONY IS ADMISSIBLE FOR PURPOSE OF CORRECTING MISTAKE IN NAME of a promisee in a promissory note, if there is something found in the note from which, connected with the parol testimony, the promisee is clearly ascertained. The terms of the contract are not thereby varied. *Jacobs v. Benson*, 609.

13. IF IT IS SHOWN THAT FRAUD WAS PRACTICED IN INCEPTION OF NOTE, OR THAT IT WAS FRAUDULENTLY put in circulation, such fact will throw the burden of proof upon the plaintiff to show that he came by the possession of the note fairly, in the due course of business, and without any knowledge of the fraud, and unattended with any circumstances justly calculated to awaken suspicion. *Pervin v. Noyes*, 632.
 14. WORDS "TRUSTEES," ETC., AFTER PROMISEES' NAMES in a note are merely *descriptio persona*. *Pierce v. Robie*, 614.
 15. INDORSEE IS NOT INDEMNIFIED, SO AS TO RENDER HIM LIABLE WITHOUT DEMAND AND NOTICE, when the mortgage taken by him to secure the ultimate payment of the note is assigned by him at the time he indorses the note. *Oeldorf v. Swartz*, 141.
 16. DECLARATION BY INDORSEE TO THIRD PERSON NOT INTERESTED IN SUBJECT-MATTER is not a sufficient waiver of presentment and notice to fix the liability of the indorser. *Id.*
- See BANKS AND BANKING, 3-6; EXECUTORS AND ADMINISTRATORS, 1-4; INJUNCTIONS, 8; INTEREST, 1; MARRIED WOMEN, 4; PARTNERSHIP, 10; PLEADING AND PRACTICE, 18; PLEDGE, 1.

NEW TRIAL.

1. NEW TRIAL WILL NOT BE GRANTED BECAUSE VERDICT WAS CONTRARY TO CHARGE OF COURT, if the charge was erroneous and the verdict was not. *Wellborn v. Weaver*, 235.
2. ALLEGATION ON MOTION FOR NEW TRIAL, THAT PARTY WAS TAKEN BY SURPRISE, is not supported by the record when there is no affidavit of the fact, and nothing to show that he had employed due diligence to obtain evidence. *May v. Hanson*, 135.

NOTARIES.

See BANKS AND BANKING, 3, 4.

NOTES.

See NEGOTIABLE INSTRUMENTS.

NOTICE.

See ASSIGNMENTS, 2, 3; BANKS AND BANKING, 4; DEEDS, 16, 17; FENCES, 4; HIGHWAYS, 4; MORTGAGES, 2; PLEADING AND PRACTICE, 24, 25.

NUISANCES.

1. STATUTE DEFINING WHAT ARE NUISANCES, AND PRESCRIBING REMEDY BY ACTION, does not take away any common-law remedy in the abatement of nuisances that the statute does not embrace. *Stiles v. Laird*, 110.
2. NUISANCE, WHETHER PUBLIC OR PRIVATE, MAY BE ABATED at common law by the party aggrieved, if done without breach of the peace. *Id.*
3. MINERS WHO ARE FIRST IN APPROPRIATION OF RUNNING WATER for mining uses may abate a nuisance caused by a dam subsequently erected below their claims by removing the dam in a peaceable manner. *Id.*
4. WHETHER GIVEN KINDS OF PROPERTY OR CLASSES OF PURSUITS ARE NUISANCES is a question for the judiciary. *Beebe v. State*, 390.

5. ACTION TO PREVENT OR ABATE NUISANCE is not a "special case" over which the legislature may give county courts jurisdiction under the California constitution. *Parsons v. Tuolumne County Water Co.*, 76.
 See EMINENT DOMAIN, 2.

OFFICES AND OFFICERS.

1. SURETIES OF JUSTICE OF PEACE DE FACTO ARE LIABLE ON THEIR BOND. *Green v. Wardwell*, 386.
 2. OFFICIAL BOND OF JUSTICE OF PEACE BECOMES OBLIGATORY from the time it is delivered to the county clerk for his approval, although not actually approved by him, if he does not reject it. *Id.*
 See ATTACHMENTS, 4-6; MANDAMUS, 3; PROCESS, 1; SHERIFFS; TRESPAS, 1, 2.

PARENT AND CHILD.

- See DOMESTIC, 2, 3; ESTATES OF DECEDENTS, 1; GUARDIAN AND WARD, 1-2; HUSBAND AND WIFE, 5.

PARTIES.

- See PLEADING AND PRACTICE, 3-6

PARTNERSHIP.

1. STEAMBOATS OWNED BY TWO OR MORE PARTIES ARE USUALLY HELD BY THEM AS TENANTS IN COMMON, and are therefore not ordinarily subject to the law of partnership; but where owned by parties who are copartners, doing a general partnership business, they are, without express agreement or circumstances showing the contrary, partnership property, and within the jurisdiction of the court of chancery in a suit by one partner against his copartner for an accounting, dissolution, and sale. *Allen v. Hawley*, 198.
 2. EACH PARTNER HAS LIEN ON PROPERTY OF PARTNERSHIP for the amount of his interest in the partnership stock, and for advances made by him for the use of the firm. *Id.*
 3. PARTNER HAS NO POWER TO CONVEY REAL ESTATE OF FIRM, either by deed or assignment, nor to make contracts, written or verbal, concerning it, specifically enforceable against his copartners. *Ruffner v. McConnell*, 362.
 4. PARTNER WHO, WITHOUT AUTHORITY, AGREES TO INDEMNIFY SURETY on an injunction bond, given in a suit prosecuted for the benefit of his firm, does not thereby bind the firm unless his copartners subsequently ratify his act. *White v. Davidson*, 699.
 5. PARTNERS CANNOT ESCAPE EFFECT OF THEIR CONTRACT NOT TO CARRY on CERTAIN TRADE, if the contract is otherwise valid, by merely taking in an additional partner. *Beard v. Dennis*, 380.
 6. ON DISSOLUTION OF PARTNERSHIP, ASSIGNMENT BY RETIRING PARTNER, *bona fide*, of all his interest in the stock and effects to the remaining partners vests the same in the latter as his individual property, and it will be distributable accordingly, notwithstanding his subsequent insolvency; and this rule applies as well to limited as to general partnerships. *Upson v. Arnold*, 302.

7. ORDER OF SALE OF PARTNERSHIP PROPERTY upon a dissolution of the partnership will be made by a court of chancery where there is no provision for its disposition in the partnership agreement. *Allen v. Hawley*, 198.
8. ORDER GRANTING INJUNCTION RESTRAINING DEFENDANT FROM COLLECTING DEBTS, making sales, etc., is proper in a suit for a dissolution and an accounting by one partner against his copartner, upon motion made, without notice, if the circumstances shown are such that the giving of notice might in all probability "accelerate the injury." *Id.*
9. PARTNER CANNOT, BY NEW CONTRACT IN NAME OF FIRM, BIND HIS LATE PARTNER after the dissolution of the partnership, even when the consideration is a debt of the firm. *Hurst v. Hill*, 705.
10. PARTNER CANNOT, AFTER DISSOLUTION, RENEW FIRM NOTE BY GIVING NEW NOTE in the name of the firm. The new note is a new contract, which cannot bind the other partner. *Id.*

See INJUNCTIONS, 3; RECEIVERS, 1, 2.

PATENTS.

See JURISDICTION, 3.

PAYMENT.

PAYMENT DOES NOT IMPORT DELIVERY OF MONEY; it may be made in property or other securities. *Ryan v. Dunlap*, 234.

See MORTGAGES, 6; RELEASE.

"PERILS OF THE SEA."

See COMMON CARRIERS, 19-22; SHIPPING, 6-8; WRECKERS, 5.

PLEADING AND PRACTICE.

1. PLEADINGS MUST BE MOST STRONGLY TAKEN AGAINST PLEADER. *Chapman v. Americ*, 80.
2. IT IS DISCRETIONARY WITH COURT TO ALLOW PLAINTIFF TO INTRODUCE EVIDENCE after motion for nonsuit. *May v. Hanson*, 135.
3. OBJECTION ON NON-JOINDER OF PARTIES MUST BE TAKEN ADVANTAGE OF BY DEMURRER, and comes too late on appeal from the final judgment. *Beard v. Knox*, 125.
4. NON-JOINDER OF JOINT OWNER OF PROPERTY IN ACTION IN TORT FOR DAMAGES for a breach of duty, and not for the specific property, can only be taken advantage of by plea in abatement; and in the absence of such plea, the owners suing may recover their proportion of the damages sustained by all, leaving the other joint owner to afterwards sue and recover his proportion of the whole damages. *Johnson v. Richardson*, 369.
5. TRUSTEES OF VOLUNTARY BENEVOLENT ASSOCIATION, WHOSE FUNDS ARE RAISED BY VOLUNTARY CONTRIBUTION of its members, may maintain a suit upon a note, although the makers thereof were members of the association. *Pierce v. Robie*, 614.
6. WHERE NOTE GIVEN TO ASSOCIATION IS MADE PAYABLE TO TRUSTEES THEREOF OR THEIR SUCCESSORS, such successors may, at the request of the association, maintain a suit upon it in the name of the former trustees; and such former trustees, as plaintiffs of record, have no power to dismiss the suit, but they may require protection from costs. *Id.*

7. IN PLEADING UNDER CODE, AVERMENT OF FACTS CONSTITUTING CAUSE OF ACTION or defense should be simple and concise, and without repetition or prolixity. *Baltzell v. Nosler*, 466.
8. WHERE VARIOUS CAUSES OF ACTION ARE UNITED IN ONE PETITION, they should be separately and distinctly stated. *Id.*
9. COMPLAINT IS NOT DEMURRABLE FOR OMITTING TO SHOW THAT OBSTRUCTION OF WATER WAS UNNECESSARY to defendant in the fair and reasonable use of the stream, where it seeks to enjoin the obstruction of the flow, and it does not appear that the defendant had any use for the water, and he is not charged with the erection of a mill, but of a dam. *Dilling v. Murray*, 385.
10. DECLARATION IN ACTION BASED ON FORBEARANCE MUST SHOW EITHER DETERIMENT TO PLAINTIFF or a benefit to the defendant; and a declaration in an action on a promise made upon the consideration of forbearance to file a caveat to a will, which contains no allegation that the testator left any assets, either real or personal, after payment of his debts, is therefore fatally defective. *Busby v. Conaway*, 688.
11. PLAINTIFF SUING ON PROMISE MADE IN CONSIDERATION OF FORBEARANCE TO FILE CAVEAT to a will must allege in his declaration that he was interested in setting the will aside. *Id.*
12. COMPLAINT AGAINST CARRIER NEED NOT NEGATIVE EXCEPTION IN BILL OF LADING against loss occasioned by "fire or dangers of the river," by alleging that the loss sued for was not so occasioned. *Bentley v. Bustard*, 561.
13. OMISSION IN COMPLAINT TO NEGATIVE EXCEPTION IN BILL OF LADING IS CURED, in an action against a carrier for loss of goods, where the plaintiff fails to aver that the loss was not occasioned by a peril within the exception, conceding that such averment is ever necessary, if the answer alleges as matter of defense that the loss was caused by a peril within the exception, and thus presents a distinct issue on that point. *Id.*
14. COMPLAINANT NEED ONLY INDORSE RELEASE OF ERRORS ON BILL FOR INJUNCTION against collection of a judgment at law, under the Indiana revised statutes of 1843, when he is required so to do by the judge granting such injunction, or by the court. *Dickerson v. Board of Commissioners of Ripley County*, 373.
15. UNDER ANSWER CONTAINING GENERAL DENIAL OF INDEBTEDNESS, and plea of payment, a judgment of garnishment against the defendant cannot be given in evidence. Such matter is special matter in avoidance, and not negativing the original indebtedness, and must therefore be specially pleaded. *Walters v. Washington Ins. Co.*, 451.
16. THOUGH RULE OF COURT MAY MAKE GENERAL DENIAL SUFFICIENT DENIAL of the averments of the petition, it cannot extend further than as a denial of the petition, and cannot open the door to special defenses and matter in avoidance. *Id.*
17. ANSWER OF CARRIER MUST SHOW NECESSITY OF JETTISON, and that such necessity was caused by a peril within the exceptions in the bill of lading, where such jettison is relied on as a justification for non-delivery of goods, and it must state the facts constituting the necessity and peril, and not mere conclusions of law, as that the accident was caused by dangers of the river, or was unforeseen and unavoidable, or the like. *Bentley v. Bustard*, 561.

18. EXECUTION OF NOTE IS ADMITTED AS TO ONE OF TWO DEFENDANTS, where the denial of the execution is sworn to by the other only. *Parsley v. Morrison*, 424.
19. PLEA OF ABATEMENT MAY BE OBJECTED TO ON GENERAL DEMURRER, because defective in not being verified by affidavit when of facts not apparent of record, or for not being seasonably filed, or for not being entitled of the term when the writ and declaration was entered. *Whiddes v. Seelye*, 661.
20. NON-TENURE CANNOT BE PLEADED IN BAR, AND ONLY IN ABATEMENT WITHIN TIME required by the rules of court. *Newbegin v. Langley*, 612.
21. PLEAS IN BAR OF SUITES ON JUDGMENTS OF SISTER STATES must deny, by clear and positive averments, every fact which would go to show jurisdiction, whether with reference to the person or the subject-matter; and where the defendant in the court below fails to deny the jurisdiction of the court in which the judgment was rendered, of the subject-matter of the suit, he cannot raise that question for the first time in the supreme court. *Latterell v. Cook*, 428.
22. RECORD WHICH SHOWS CAUSE OF ACTION AND JUDGMENT RENDERED THEREON is, in an action on a judgment of a sister state, sufficient to annex to plaintiff's petition, under the provisions of section 1750 of the Iowa code, which requires that when a pleading is founded on a written instrument a copy thereof must be annexed to such pleading. *Id.*
23. IT IS NOT ERROR FOR COURT TO ALLOW AMENDMENT to the declaration, in cases of libel and slander, striking out the original words, and inserting other words varying in terms, though amounting very much to the same in import, after the jury had been charged that the words proved would not sustain the declaration. Such amendment would not present a new cause of action. *Hawks v. Patton*, 266.
24. WHERE OBJECT OF NOTICE OF APPEAL IS ACCOMPLISHED, it is immaterial whether there was notice or not. *McLeron v. Shartzer*, 84.
25. NO NOTICE OF APPEAL IS NECESSARY TO BE SHOWN when both parties appear. *Id.*
26. RESULT REACHED BY LOWER COURT ON WEIGHT OF EVIDENCE WILL NOT BE DISTURBED in the supreme court. *Spooner v. Dunn*, 414.
27. PARTY APPEALING FROM JUSTICE'S JUDGMENT CANNOT MOVE TO DISMISS the appeal in the appellate court on the ground that the certificate of the justice to his transcript is defective. *Stowers v. Milledge*, 434.
28. TRANSCRIPT SHOULD BE MADE BY TAKING RECORD OF PROCEEDINGS of the court as a basis, and incorporating therein each paper filed, in its proper place and date. It should not consist of merely naked copies of papers, but should contain sufficient explanation by the clerk to show their order, dates, and connection. *Baltzell v. Norder*, 466.
29. ASSIGNMENT OF ERROR IS TOO BROAD, AND WILL NOT BE NOTICED BY APPELLATE COURT, when framed as follows: "In overruling various other motions and questions apparent upon the record, which is made part and parcel of this assignment of errors." *Santo v. State*, 487.
30. IMPROPER ADMISSION OF IMMATERIAL EVIDENCE WHICH HAS WORKED NO PREJUDICE to the party complaining is not ground for disturbing the judgment of the court below. *Latterell v. Cook*, 428.
31. WHERE BILL OF EXCEPTIONS FAILS TO SHOW THAT EXCEPTIONS WERE TAKEN at the time to the rulings of the trial court in giving and refusing

- instructions, and the bill does not purport to contain all the evidence, the supreme court will not review the decisions of the lower court in giving instructions, or in refusing a new trial. *Love v. Moyashan*, 308.
32. STATEMENT IN BILL OF EXCEPTIONS that "the above is nearly all the testimony given" is not sufficient to enable the appellate court to determine whether or not the verdict was correct. *Id.*
33. OBJECTION TO INFORMATION AND WARRANT, THAT CERTAIN MATTERS THEREIN CONTAINED ARE NOT PARTICULARLY DESCRIBED, cannot, after appearance and trial in the lower court, be taken in appellate court for the first time. *Santo v. State*, 487.
34. WHERE APPELLATE COURT REVERSES DECREES AND REMANDS CAUSE to the lower court for further proceedings, that court can only carry into effect the mandate of the appellate court so far as its direction extends; but the lower court is left free to make any order or direction in the further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision. *Cunningham v. Ashley*, 62.
35. IN SUIT BEFORE APPELLATE COURT TO RECOVER LAND OF WHICH CLAIMANT HAS BEEN DISSEISIN, a recovery is necessarily followed by the resulting consequence of a right to the rents and profits of the land during the wrongful and fraudulent disseisin of the complainant; and no express claim to rents and profits need be set up in the bill, as no distinct issue can be taken upon it; but they may be recovered in the court below, under the general prayer of relief. *Id.*
36. PLAINTIFF IS NOT REQUIRED TO ATTACH TO HIS PETITION EVIDENCE in the case, but simply the instrument or account on which he brings his suit. *Latterett v. Cook*, 428.
37. IN ACTION ON JUDGMENT OF ANOTHER STATE, IF PLAINTIFF FILES WITH HIS PETITION TRANSCRIPT consisting of a declaration in *assumpsit* and the judgment thereon, he is not precluded from offering in evidence on the trial a further or amended transcript containing, in addition to the declaration and judgment contained in the first transcript, a copy of the original writ or summons, and the service thereon. *Id.*
38. STRANGERS TO RECORD CANNOT COLLATERALLY INTERPOSE OBJECTIONS, which can alone be made in a direct proceeding by motion or writ of error. *Phillips v. Coffee*, 357.

See ATTACHMENTS, 8; CONTRACTS, 3, 4; COURTS, 5; EVIDENCE, 6, 15; INJUNCTIONS, 6-11; INSTRUCTIONS; JUDGMENTS; NEGOTIABLE INSTRUMENTS, 10-16; SPECIFIC PERFORMANCE, 4-6; WRIT OF ERROR.

PLEDGE.

1. PARTY, BY PLEDGING NEGOTIABLE SECURITIES TRANSFERABLE BY DELIVERY loses all right to the securities when transferred by the pledges in good faith to a third party. *Coit v. Humbert*, 128.
2. WARRANTS DRAWN BY OFFICERS OF GOVERNMENT UPON ITS DISBURSING OFFICERS, having been pledged, may be held against the original owner by one acquiring them in good faith from the pledgee. *Id.*

POLICE POWER.

See CONSTITUTIONAL LAW, 1, 2.

POSSESSION.

SELL TO QUIET TITLE IS NOT MAINTAINABLE BY HOLDER OF LEGAL TITLE OUT OF POSSESSION, as a general rule; although the reason of this doctrine would not embrace mere equitable titles which could not be asserted at law. *Smith v. McConnell*, 340.

See DEEDS; MORTGAGES, 8, 10, 11; NEGOTIABLE INSTRUMENTS, 4, 5.

POWERS.

See EXECUTORS AND ADMINISTRATORS, 5.

PREFERENCES.

See DEBTOR AND CREDITOR, 2.

PRESUMPTIONS.

See GRANTS, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVILEGE.

See ARREST.

PROBATE COURTS.

See COURTS; ESTATES OF DECEDENTS, 2.

PROCESS.

1. CORPORATE SEAL OF TOWN IS NOT SEAL OF MAYOR AS JUSTICE OF PEACE, and need not be appended to a warrant issued by him in that capacity, nor is his court a court of record. *Santo v. State*, 457.

2. PEACE-OFFICERS ARE NOT PROHIBITED FROM MAKING COMPLAINT OR VIOLATION OF PENAL LAWS by statute providing that no sheriff, deputy sheriff, coroner, or constable shall appear as attorney or counsel for any one, nor make any writing or process to commence a suit or proceeding. *Id.*

See ATTACHMENTS; INFANCY; JUDGMENTS, 12; SHERIFFS.

PROFITS.

See DAMAGES.

PROTEST.

See BANKS AND BANKING, 3, 4.

PUBLIC LANDS.

See MINERAL LANDS.

RAILROADS.

See COMMON CARRIERS, 5-7, 10, 16, 17; FENCES; MASTER AND SERVANT, 5.

REALTY.

REAL ESTATE MAY BE CONVEYED BY INSTRUMENT WITHOUT SEAL, under the code of Iowa. *Pierson v. Armstrong*, 440.

See EVIDENCE, 7; EXECUTORS AND ADMINISTRATORS, 5, 6; GRANTS; HOMESTEADS; INJUNCTIONS, 4, 5; JUDGMENTS, 8; MORTGAGES; PARTNERSHIP, 3; PLEADING AND PRACTICE, 35; RESCISSION OF CONTRACTS; REVERSIONS; SPECIFIC PERFORMANCE, 6.

RECEIVERS.

1. RECEIVER WILL BE APPOINTED BY COURT OF CHANCERY to settle up the affairs of a partnership whenever it is made to appear, by a bill filed by one partner, that there is a breach of duty or a violation of the agreement of partnership on the part of the others. *Allen v. Hawley*, 198.
2. COURT OF CHANCERY HAS NO POWER TO APPOINT RECEIVER TO CARRY ON BUSINESS of a copartnership. Such power would not be intended by an order "to take charge of the steamer Quincy, to prevent injuries, * * * to repair said boat so as to put her in condition for sale, or such disposition of her as may be ordered by the parties, or as the court may order. The expense of repair and the like to be repaid by proper use of said boat." *Id.*

RECORDS.

See AUTHENTICATION OF RECORDS; EVIDENCE, 15.

REDEMPTION.

See MORTGAGES, 12-15.

REGISTRATION.

See DEEDS, 12.

RELEASE.

INSTRUMENT UNDER SEAL MAY BE RELEASED OR DISCHARGED BY EXECUTIVE PAROL AGREEMENT, although this cannot be done by a mere parol agreement. *Dickerson v. Board of Commissioners of Ripley County*, 373.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; EXPECTANCY; MORTGAGES, 6; PAYMENT.

REPLEVIN.

OWNER OF PROPERTY LEVIED UPON AND SOLD UNDER WRIT OF ATTACHMENT AGAINST ANOTHER may recover such property from the purchaser, and damages for its detention. *Overby v. McGee*, 49.

See WITNESSES, 7.

RENT.

See JUDICIAL SALES, 5; MORTGAGES, 10; PLEADING AND PRACTICE, 35.

RESCISSON OF CONTRACTS.

ACQUIESCEENCE OF VENDEE IN RESCISSION OF CONTRACT FOR SALE OF LAND cannot be inferred where he proposes to pay the consideration with the highest rate of interest, and brings suit for specific performance before the vendor indicates any intention of declaring the contract at an end. *Young v. Daniels*, 477.

RESTRAINT OF TRADE.

See CONTRACTS, 10-15; INJUNCTIONS, 1-3; PARTNERSHIP, 2.

REVERSIONS.

CONDITION IN DEED OF LAND, THAT IF GRANTEE DIE WITHOUT CHILDREN living at the time of her decease the land shall revert to the grantor, is fulfilled by the grantee's dying leaving one child surviving her, and the estate conveyed will pass to the heir of the child after its death. *Pierson v. Armstrong*, 440.

RIPARIAN RIGHTS.

1. **RIGHT TO RUNNING WATER, IN CALIFORNIA, IS RIGHT RUNNING WITH LAND**, a corporeal privilege bestowed upon the occupier or appropriator of the soil, and has none of the characteristics of mere personality. *Hill v. Newman*, 140.
2. **RIGHT TO RUNNING WATER EXISTS, IN CALIFORNIA, FROM POLICY OF HER LAWS**, without private ownership of the soil, upon the ground of prior location upon the land, or prior appropriation and use of the water. *Id.*
3. **EVERY INJURY TO RIPARIAN PROPRIETOR BELOW WILL NOT CONFER RIGHT OF ACTION.** It is necessary to take into consideration the capacity of the stream, the adaptation of the machinery to it, and all the attendant circumstances; and when all these are properly considered, if the proprietor below is materially injured, when considered in relation to the facts of the particular case, he is entitled to redress. *Dilling v. Murray*, 385.
4. **EVERY RIPARIAN PROPRIETOR HAS EQUAL RIGHT TO FLOW OF WATER THROUGH HIS LAND**, and no one has a right to use it to the material injury of those below him. If he diverts the stream, he must return it to its natural channel when it leaves his estate. *Id.*

See NUISANCES, 3.

SALES.

See ASSIGNMENTS, 1, 4; DAMAGES, 1, 2; JUDICIAL SALES; MORTGAGES, 1; STATUTE OF FRAUDS, 2, 3.

SCIRE FACIAS.

See EXECUTIONS, 7; JURISDICTION, 2.

SEALS.

See DEEDS, 18.

SEAMEN.

See SHIPPING, 17, 18.

SEARCH-WARRANTS.

See CONSTITUTIONAL LAW, 15, 20.

SERVITUDES.

1. **ONE BEING SOLE OWNER OF MILL AND PRIVILEGES AND DAM CANNOT, BY MEANS OF SUCH DAM, flow lands above him owned by himself and as-**

other in common, nor can he convey to his grantee the right to do so.
Hutchinson v. Chase, 645.

2. PROPRIETOR OF LAND FRONTING-ON BAYOU CANNOT MAINTAIN ARTIFICIAL DRAINAGE, throwing the water upon the rear plantation, when the natural drainage is lateral, in consequence of being intercepted by a ridge.
Kilgore v. Greenberg, 597.

See CO-TENANCY, 1, 2.

SET-OFF.

See EXECUTORS AND ADMINISTRATORS, 4.

SHERIFFS.

1. SHERIFF WHO REFUSES TO EXECUTE CAPIAS AD SATISFACTIUM will not be protected because the writ was erroneously dated, so that at its date the person whose name it bore teste was not a judge of the court from which it issued, as such defect is a mere irregularity, and does not render the process void. *Jordan v. Porterfield*, 301.
2. OFFICER, IN CASE OF MERE IRREGULARITIES IN PROCESS, refuses to act at his peril. *Id.*
3. IN EXECUTING WRIT OF ATTACHMENT OR EXECUTION, a sheriff or other officer is, as a general rule, bound at his peril to take the debtor's goods alone; and is guilty of trespass for taking the goods of a stranger, even though assured by the plaintiff in execution that they are the property of the defendant. *Owby v. McGee*, 49.
4. OFFICER MAY LEVY UPON Goods of DEFENDANT AND THOSE of THIRD PERSON where they are so mixed as not to be readily distinguished, and only becomes liable to a stranger for levying should he refuse to deliver them to the rightful owner upon request. *Id.*
5. SHERIFF, UNDER STATUTES AND DECISIONS OF LOUISIANA, CANNOT DEMAND INDEMNITY BOND upon a seizure of goods and demand for release. He must either call a jury to determine whether the goods belong to the defendant or act at his own peril. *Deslap v. Freret*, 590.
6. PLAINTIFF IS NOT ESTOPPED FROM SHOWING FALSETY OF RETURN, in an action against a sheriff because of offering the return in evidence, but he must prove the judgment, writ, and return, and then show the return to be false. *Id.*
7. BURDEN OF PROOF.—When it is shown by *prima facie* evidence that a sheriff's return is incorrect, the burden of proof is upon the sheriff to show its correctness. *Id.*

See JUDICIAL SALES; PROCESS, 2; TRESPASS, 1; WITNESSES, 10.

SHIPPING.

1. MASTER OF INSURED VESSEL, WHICH BECOMES DISABLED, is AUTHORIZED TO SELL HER when for the best interest of those concerned, and whether he was justified in selling in a particular case is a question to be determined by the circumstances and condition of the vessel at the time and place where the sale was made. *Prince v. Ocean Insurance Co.*, 676.
2. MASTER OWNING PART OF DISABLED VESSEL SOLD ON ACCOUNT OF INJURY is justified in making such sale under the same circumstances which would justify him if he were not such part owner. *Id.*

2. SURVEY UPON DISABLED VESSEL IS PRESUMED TO BE CORRECT, but is not conclusive, as it does not control the rights of the parties, but is to be considered as an important transaction, designed to protect the rights of all interested. *Id.*
4. MASTER, TO JUSTIFY SALE OF DISABLED VESSEL, MUST SHOW that such sale arose from necessity, which imports no more than a faithful performance of the duty imposed on him to make that decision, when a vessel is injured, which will best promote the interests of all for whom he has become agent. *Id.*
5. INSTRUCTIONS TO JURY AS TO NECESSITY UNDER WHICH MASTER MAY EFFECT SALE of disabled vessel requires no particular form of words, but is sufficient if the jury is given to understand that to justify such sale the master, under the circumstances, acted for the best interests of all concerned; and an instruction that there must be an apparent necessity for the sale, existing at the time and place, is sufficient without any further qualification to intensify the term "necessity." *Id.*
6. ACCIDENT OCCASIONED BY VESSEL RUNNING UPON KNOWN OBSTRUCTION is attributable to dangers of the river, or perils of the sea, as the case may be, if, in spite of reasonable care and skill, the vessel was driven there by the natural force of wind and tempest, but not otherwise. *Bentley v. Bustard*, 561.
7. ACCIDENT CAUSED BY VESSEL RUNNING UPON UNKNOWN OBSTRUCTION, without the fault of the navigators, at a place where vessels previously passed safely, is attributable to dangers of the river or perils of the sea. *Id.*
8. "PERILS OF SEA" MEANS NATURAL ACCIDENTS peculiar to the sea which do not happen by human intervention, and are not to be prevented by human prudence. *Id.*
9. QUESTION IS FOR JURY WHETHER GROUNDED VESSEL COULD HAVE BEEN RELIEVED by the use of spars and anchora, and whether the failure to use them contributed to produce, continue, or increase the danger relied upon to excuse a jettison of goods. *Id.*
10. THAT JETTISON WAS DEEMED NECESSARY BY MASTER AND OFFICERS of vessel does not justify it, if it was not in fact necessary, but its propriety must be determined by the court and jury. *Id.*
11. EVIDENCE OF CONSULTATION BY MASTER AND OFFICERS BEFORE JETTISON of goods from a grounded vessel, and of opinions then expressed as to the condition of the vessel, the means of relief, and the necessity of the jettison, is competent but not conclusive evidence in an action for the loss of the goods, and opinions so expressed may be proved either by the officers themselves or by persons present. *Id.*
12. JETTISON NEED NOT BE REQUIRED TO PRESERVE LIFE to render it justifiable. *Id.*
13. POWERS AND DUTIES OF SHIP-MASTERS WHEN IN FOREIGN PORTS, AND IN CASE OF DISASTER, are very extensive. They are then the general agents of the owners so far as respects acts necessary to the successful prosecution of their voyage. *Duncan v. Reed*, 635.
14. DUTY OF MASTER OF SHIP IN CASE OF DISASTER IS TO SAVE HER IF POSSIBLE, if not, to so dispose of the wreck that the owners may realize the most that can be saved therefrom; nor does his duty cease until the proceeds which may be saved are placed at the disposal of the owners. *Id.*

15. MASTER OF VESSEL IS ENTITLED TO REASONABLE compensation for services rendered in disposing of the wreck of such vessel, and also remuneration for his necessary incidental expenses. In these expenses the items charged for physicians' bills, board, and the amount paid for his return passage are properly included. *Id.*
16. CAPTAIN OF VESSEL CANNOT BE ALLOWED FOR SHORTAGE IN AMOUNT OF MONEY returned by him; at least without showing that the loss was not occasioned by any fault on his part. *Id.*
17. WHEN SEAMAN WILLFULLY DISOBEDIES CAPTAIN'S ORDERS, and is discharged for so doing, he is not entitled to any rights which he might have if he had continued doing his duty. *Ties v. Radovich*, 592.
18. IT IS SEAMAN'S DUTY, IN CASE OF DISASTER, TO EXERT HIMSELF to save the cargo, and as long as there is any prospect of saving the cargo, he is bound to obey the commander. *Id.*

See COMMON CARRIERS; INSURANCE, 4.

SLANDER.

LIBEL AND SLANDER—EVIDENCE—GENERAL RULE THAT WITNESS MUST STATE FACTS, and not his inference from them, seems to have an exception in cases of libel and slander, as the injury done in such cases depends upon the effect the words produced in the minds of hearers; and the way to determine this effect is to find out how the words were understood by hearers. *Hawks v. Patton*, 266.

SLAVES.

See HUSBAND AND WIFE, 6.

SOVEREIGNTY.

1. SOVEREIGN CANNOT BE SUED UNLESS BY ITS OWN CONSENT. *Hensseler v. Borden*, 130.
2. CREDITORS OF STATE HAVE NOTHING TO RELY UPON except her good faith, and she has equally the power to postpone the time of payment or to refuse to pay at all. *Id.*
3. ONE HAS NO RIGHT TO REMEDY AGAINST GOVERNMENT OR SUBDIVISION THEREOF which cannot be taken away by the government. *Id.*
4. RIGHT OF STATE TO LAND UNDER WATER, WHERE TIDE EBBES AND FLOWS, is founded upon her sovereign control over the easement or right of navigation. *Guy v. Hermance*, 85.
5. RIGHT OF STATE IN TIDE-LANDS CEASES WHEN EASEMENT OF NAVIGATION IS DESTROYED, except to prosecute for purpresture and have the easement restored. *Id.*

See ATTACHMENTS, 6; CONSTITUTIONAL LAW, 4-8; EMINENT DOMAIN.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE WILL BE DECREED OF AGREEMENT TO TURN OVER CHOOSES IN ACTION to indemnify the complainants against any loss they might sustain by reason of their suretyship for the defendant *Shockley v. Davis*, 233.
2. BILL FOR SPECIFIC PERFORMANCE OF AGREEMENT TO TURN OVER CHOOSES IN ACTION as indemnity to the complainant should state with minute-

- ness what books of account or evidences of debt were to be turned over, or if complainant could not obtain access to such choses in action, the bill should so state, and call upon the defendant to supply the deficiency. *Id.*
- 2. **VENDOR CAN SELDOM ASK INTERPOSITION OF COURT OF EQUITY** to specifically enforce a parol contract. He must show that he will be prejudiced by its non-performance, as that the vendee had been given and has retained possession. *Printup v. Mitchell*, 258.
 - 4. **APPLICATION FOR SPECIFIC PERFORMANCE OF CONTRACT IS ADDRESSED TO SOUND DISCRETION OF CHANCELLOR**, guided and governed by the general principles of equity. *Young v. Daniels*, 477.
 - 5. **RELIEF IS NOT MATTER OF RIGHT IN EITHER PARTY TO SUIT FOR SPECIFIC PERFORMANCE**, but it is granted or withheld, according to the circumstances of each case, when the rules or principles of equity will not furnish any exact measure of justice between the parties. *Id.*
 - 6. **SPECIFIC PERFORMANCE IS GRANTED TO GREATER EXTENT IN CASES OF CONTRACTS RESPECTING REAL PROPERTY** than in cases respecting personal property; and while in the latter case the jurisdiction to grant it is limited to special circumstances, in cases of land contracts it is universally maintained. *Id.*
 - 7. **VENDEE DOES NOT FORFEIT RIGHT TO SPECIFIC PERFORMANCE BY LACHES** in offer to pay purchase money, when it appears that vendor was a non-resident of the state; that neither he nor any person for him was at the place of payment to demand payment when the notes for the purchase price became due; that he gave the vendee no notice that he should insist upon strict compliance with the contract, and had not returned the notes to the vendee; that within three months after the last note became due the vendee, at the place where the notes were to be paid, and to the person who had been the vendor's agent in the premises, offered to perform the contract on his part and demanded the deed; and that within six months thereafter the vendee commenced suit to enforce specific performance, bringing the money into court. *Id.*
 - 8. **VENDEE SEEKING TO ENFORCE SPECIFIC PERFORMANCE NEED NOT TENDER DEED** to vendor for execution before bringing suit. *Id.*
 - 9. **VENDEE, BEFORE BRINGING SUIT FOR SPECIFIC PERFORMANCE**, must have performed or offered to perform whatever the contract has made a condition precedent on his part. *Id.*
 - 10. **VENDEE IS NOT BOUND TO FOLLOW VENDOR TO HIS RESIDENCE WITHOUT STATE** to make tender before bringing suit for specific performance, after he has applied within reasonable time after the maturity of the notes at the place stipulated for their payment, and there demanded the deed. *Id.*
 - 11. **SPECIFIC PERFORMANCE—EQUITABLE JURISDICTION.**—Plaintiff sued to recover the value of labor performed in erecting a building upon defendant's lot. Defendant files a cross-bill for an injunction, alleging that plaintiff had agreed to build the house in consideration of the moiety of the property, and prays that plaintiff be decreed to take a conveyance according to his agreement: *held*, that specific performance of this agreement cannot be decreed; also, that the injunction should not be granted, as, provided defendant can establish this agreement, it is a good defense at law. *Printup v. Mitchell*, 258.

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SURPRISE.

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TENANTS IN COMMON.

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See CRIMINAL LAW, 3.

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See SOVEREIGNTY, 4, 5.

TIME.

1. TIME MAY BE OF ESSENCE OF CONTRACT CONCERNING LAND. *Young v. Daniels*, 477.
2. TIME IS NOT, IN EQUITY, OF ESSENCE OF CONTRACT, except by express stipulation of the parties, or unless it necessarily follows from the nature and circumstances of the contract. *Id.*
3. TIME IS NOT MADE ESSENCE OF CONTRACT FOR SALE OF LAND by a clause giving the vendor the election to consider the contract at an end in the event of the non-payment of the money at the time limited, without some evidence that the vendor elected so to treat it. *Id.*
4. TIME IS NOT ESSENCE OF CONTRACT FOR SALE OF LAND, in the absence of express agreement, and the contract is not forfeited by non-payment of money on day it becomes due; but specific performance may be enforced where it does not appear either that the land was improved, yielding a yearly rent, or that the property is liable to fluctuation in value, or has actually changed in value, or that between the sale and offer to pay there was any change affecting the rights, interests, or obligations of the parties, or that the vendee, by his acquiescence or otherwise, has treated the contract as rescinded. *Id.*

See JUDICIAL SALES, 1.

TORTS.

ALL WHO AID, COMMAND, ADVISE, OR COUNTENANCE COMMISSION OF TORT by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner that they would be if they had done it with their own hands. *Moir v. Hopkins*, 312.

See AGENCY, 6; JUDGMENTS, 1; MASTER AND SERVANT, 1, 3.

TOWNS.

See HIGHWAYS, 1-4.

TRESPASS.

1. ACTION OF TRESPASS AGAINST OFFICER AND PLAINTIFF IN ATTACHMENT may be maintained, by the owner of property levied upon and sold under a writ of attachment against another, for the taking of the property,

although, when the attachment was made, the property was in the defendant debtor's possession as a loan. *Overby v. McGee*, 49.

- 2. NEITHER JUSTICE OF PEACE NOR PLAINTIFF IN JUDGMENT BECOMES TRESPASSER** by enforcing a judgment of the former which remains unrescinded and unpaid; although such judgment may be erroneous if the justice had jurisdiction of the case in which it was rendered. *Deal v. Harris*, 686.
- 3. THAT PLAINTIFF KEPT BAWDY-HOUSE IS NO DEFENSE** in an action of trespass for entering a dwelling-house, and taking and carrying away the goods of the occupant. *Love v. Moynihan*, 306.

See JUDGMENTS, 2, 5; MASTER AND SERVANT, 2.

TROVER.

- 1. TROVER LIES BY MORTGAGEE IN POSSESSION AGAINST STRANGER FOR CUTTING TREES** upon the former's premises and taking them away, the severance constituting the trees personal property, and the taking away the asportation for which the action lies. *Whidden v. Seelye*, 661.
- 2. TROVER IS TRANSITORY ACTION, AND LIES FOR CONVERSION of personal property in a foreign jurisdiction.** *Id.*

See CO-TENANCY, 3.

TRUSTS AND TRUSTEES.

- 1. PAROL EVIDENCE CANNOT CHANGE ABSOLUTE DEED INTO ONE OF TRUST** unless there be fraud, accident, or mistake. *Ratliff v. Ellis*, 471.
- 2. EXPRESS TRUST IN LAND CAN BE CREATED OR DECLARED BY WRITING ONLY.** *Id.*
- 3. EXPRESS TRUST UPON LAND CONVEYED BY DECEDENT CANNOT BE CREATED BY INVENTORY OF ESTATE** that includes land as part of the estate, but states the title to be in another, notwithstanding the grantee was present when the inventory was made, and knew of it, but made no objection. It is no writing of the grantee, and amounts to no more than parol evidence. *Id.*
- 4. EXPRESS TRUST UPON LAND CONVEYED BY DECEDENT TO ONE WHO BECOMES ADMINISTRATOR** cannot be created by charge for payment of taxes in administration account, when it is not shown that the taxes were levied on this land, although it appears that the amount of the charge is the same as the tax would have been upon this land. The evidence is too uncertain to constitute a written acknowledgment of the administrator that the land was part of the decedent's estate. *Id.*
- 5. RESULTING TRUST DOES NOT EXIST IN FAVOR OF HEIRS** of persons who made an assignment to another of a money demand and a conveyance of certain real estate, absolute upon their face, and importing a valuable consideration; but upon an express verbal condition that the proceeds from the collection of the demand and the sale of the real estate should be held in trust for the heirs of the assignors and grantors. *Irvine v. Ivers*, 420.
- 6. EXPRESS TRUST IN LANDS CANNOT BE VERNALLY DECLARED** under the Indiana revised statutes of 1831. *Id.*
- 7. IF PARTY WHO SETS UP RESULTING TRUST IN LANDS HAS MADE NO PAYMENT,** he cannot be permitted to show by parol evidence that the purchase was made for his benefit. *Id.*

8. RESULTING TRUST NEED NOT BE IN WRITING, but may be proved by parol, even against the face of the deed or the answer of the trustee. *Id.*
 9. USE IS INHERITABLE ESTATE UNDER IOWA CODE. *Pierson v. Armstrong*, 440.
- See HUSBAND AND WIFE, 4; INSURANCE, 1; MARRIED WOMEN, 1, 7, 10, 12; PLEADING AND PRACTICE, 5, 6.

USES.

See TRUSTS AND TRUSTEES, 9.

VERDICT.

1. EVERY REASONABLE CONSTRUCTION SHOULD BE ADOPTED FOR PURPOSE OF WORKING VERDICT INTO FORM, so as to make it serve; but this rule is limited to cases where the jury have expressed their meaning in an informal manner. The court has no power to supply substantial omissions. *Wood v. McGuire's Children*, 246.
2. DEFECTIVE VERDICT.—In an action of ejectment, where the verdict is silent as to one of the plaintiffs, the court is not at liberty to answer for the jury whether the judgment should be for the plaintiff or the defendant, and consequently the verdict is defective. *Id.*
3. VERDICT MUST COMPREHEND WHOLE ISSUE OR ISSUES SUBMITTED TO JURY in a particular cause, and must find certainly, either for or against every party to the suit. *Id.*
4. VERDICT OF JURY MAY BE DETERMINED BY AVERAGE, OR OTHER SIMILAR MEANS, provided the jurors agree upon such sum, after it is found, as their verdict; but they must not previously be bound by the contingent result, and must reserve to themselves the right to dissent therefrom. *Wilson v. Berryman*, 78.
5. To MAKE LEGAL VERDICT, IN CASE OF HOMICIDE, the jury must find the conclusion of law upon the facts; and notwithstanding it is their duty to receive a charge from the court, still the conclusion must be the result of their own conviction and understanding. *Keeser v. State*, 209.
6. GAMBLING VERDICTS ARE IRREGULAR AND WILL BE SET ASIDE; e. g., when each member, for the purpose of arriving at a verdict, agrees to set down a sum according to his own judgment, divide the aggregate sum by twelve, and return the quotient as the verdict, and does so return such a verdict. *Wilson v. Berryman*, 78.

See INSTRUCTIONS; JURY AND JURORS, 4, 5; NEW TRIAL, 1.

VINDICTIVE DAMAGES.

See DAMAGES, 5.

WAGERS.

See CRIMINAL LAW, 4.

WAREHOUSEMEN.

See COMMON CARRIERS, 11, 12.

WARRANTY.

See JUDGMENTS, 1.

WASTE.

2. TAKING ROCK FROM BLUFF WITHIN BOUNDARIES OF RIGHT OF WAY granted over another's land for use in macadamizing streets and building culverts amounts to a commission of waste, which will be enjoined at the suit of the proprietor of the land. *Smith v. City Council of Rose*, 298.
2. INJUNCTIONS TO STAY WASTE ARE GRANTED almost as a matter of course. *Id.*

WATERCOURSES.

POLICY OF CALIFORNIA LEGISLATION HAS CONFERRED RIGHT TO DIVERSE STREAMS from their natural channels for mining purposes equally as it has conferred the privilege to work the mines. *Irvin v. Phillips*, 113. See JURISDICTION, 1; MINERAL LANDS, 5; NUISANCES, 3; RIPARIAN RIGHTS.

WAYS.

GIFT OF RIGHT OF WAY FOR STREET confers the right to level the same and to do everything requisite to the making of the street, but does not amount to a gift of the earth or other materials that may exist within the boundary lines of the right of way given. *Smith v. City Council of Rose*, 298.

See WASTE, 1.

WILLS.

1. LIMITATION BY WAY OF EXECUTORY DEVISE, which may possibly not take effect within the term of a life or lives in being at the death of the testator and twenty-one years, or in case of a child or centre or more twenty-one years and nine months, afterward, is void as being too remote, and tending to create a perpetuity. *Brattle Square Church v. Grant*, 725.
 2. DEVISE WHICH IS SUBJECT TO CONDITIONAL LIMITATION, VOID FOR REMOTENESS, vests in the first taker an absolute estate. *Id.*
 3. INTENT OF TESTATOR WILL GENERALLY CONTROL IN CONSTRUCTION OF DEVISE, but where such intent cannot be given force without a violation of the rules of law, it will fail of effect. *Id.*
 4. DEVISE OF HOUSE AND LAND TO DEACONS OF CHURCH AND THEIR SUCCESSORS FOREVER, on condition that the minister or eldest minister of said church shall constantly reside and dwell in said house during such time as he is minister of said church, and in case the same is not improved for that use only, then the bequest to be void and of no force, and said house and land to then revert to the nephew of testatrix, is a conditional limitation to the nephew, and not a devise upon condition, and as such is void for being too remote, and an absolute estate in fee vests in the deacons and their successors. *Id.*
 5. "CHILDREN" IS GENERALLY WORD OF PURCHASE, and not of limitation, in a will. *Carr v. Estill*, 548.
 6. DEVISE TO WOMAN "AND HER CHILDREN," SHE BEING UNMARRIED and having no children at the time, where she afterwards marries and has children, confers upon her, in Kentucky, an estate for life with remainder to her children; though it would confer an estate-tail in England. *Id.*
- See DEEDS, 2, 4, 11, 12; ESTATES OF DECEDENTS, 1; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE, 8.

WITNESSES.

1. TESTIMONY OF DECEASED WITNESS ON FORMER TRIAL IS ADMISSIBLE ONLY where the witness can state the substance of his whole testimony, and state the whole of the ideas communicated to the jury by his testimony. *Emery v. Fowler*, 627.
2. WITNESS SHOULD BE PERMITTED TO TESTIFY AS TO "HIS UNDERSTANDING" of what he heard certain parties say in relation to an agreement between them. *Printap v. Mitchell*, 258.
3. GENERAL CHARACTER.—The following are proper questions to witness in a case of homicide, to establish the general character of the deceased for violence in a particular place: "Are you acquainted with the general character of the deceased for violence in the particular place where the difficulty occurred?" and, "What was the character of the deceased for violence in that particular place?" *Keener v. State*, 269.
4. OPINIONS OF WITNESSES EXPERIENCED IN RIVER NAVIGATION as to whether or not the situation of a vessel which had run aground was such as to preclude any reasonable expectation or chance of relieving her by the use of spars and anchors, and to justify the master in not resorting to such means, are competent evidence in an action for loss of goods jettisoned to relieve a vessel so situated. *Bentley v. Bustard*, 561.
5. PILOT IS COMPETENT WITNESS FOR CARRIER, IN ACTION FOR LOSS of goods jettisoned from a grounded vessel, where justification of the jettison is claimed. *Id.*
6. WITNESS MAY BE ASKED, FOR PURPOSE OF CONTRADICTING ANOTHER WITNESS, whether the latter has made a different statement on another occasion, when a proper foundation has been laid by a preliminary question as to the time, place, and person involved in the supposed contradiction, and the matter inquired of is relevant to the issues in the case. *Galeas & Chicago Union R. R. Co. v. Fay*, 323.
7. DEFENDANT IS COMPETENT WITNESS FOR HIS CO-DEFENDANT, under the Indiana statute, where, in an action to recover possession of a chattel alleged to have been wrongfully taken and detained, their interests are antagonistic to the extent that one of them is not liable at all events in the absence of a demand, he being a *bona fide* purchaser. *Wood v. Cohen*, 389.
8. DEFENDANT IN CRIMINAL ACTION CANNOT OBJECT TO WITNESS for the state on the ground that no notice of such witness had been given him, and that his name did not appear in the list of witnesses sworn before the grand jury, under a statute requiring that the defendant in a criminal cause shall be furnished before arraignment with "a list of the witnesses who gave testimony before the grand jury." *Keener v. State*, 269.
9. WITNESSES CANNOT GIVE THEIR OPINION as to whether the defendant, being tried for murder, would be caused to look for difficulty from the manner, language, and tone of voice of the deceased just previous to the homicide. They must testify what the manner, language, and tone of voice were. *Id.*
10. TESTIMONY OF SHERIFF IS COMPETENT TO DISCLOSE WHAT TRANSPRISED IN JURY-ROOM. *Wilson v. Berryman*, 78.

See DEPOSITIONS; EVIDENCE, 11, 14; SLANDER, 1.

WRITINGS.

See ALTERATION OF INSTRUMENTS; EVIDENCE.

WRIT OF ENTRY.

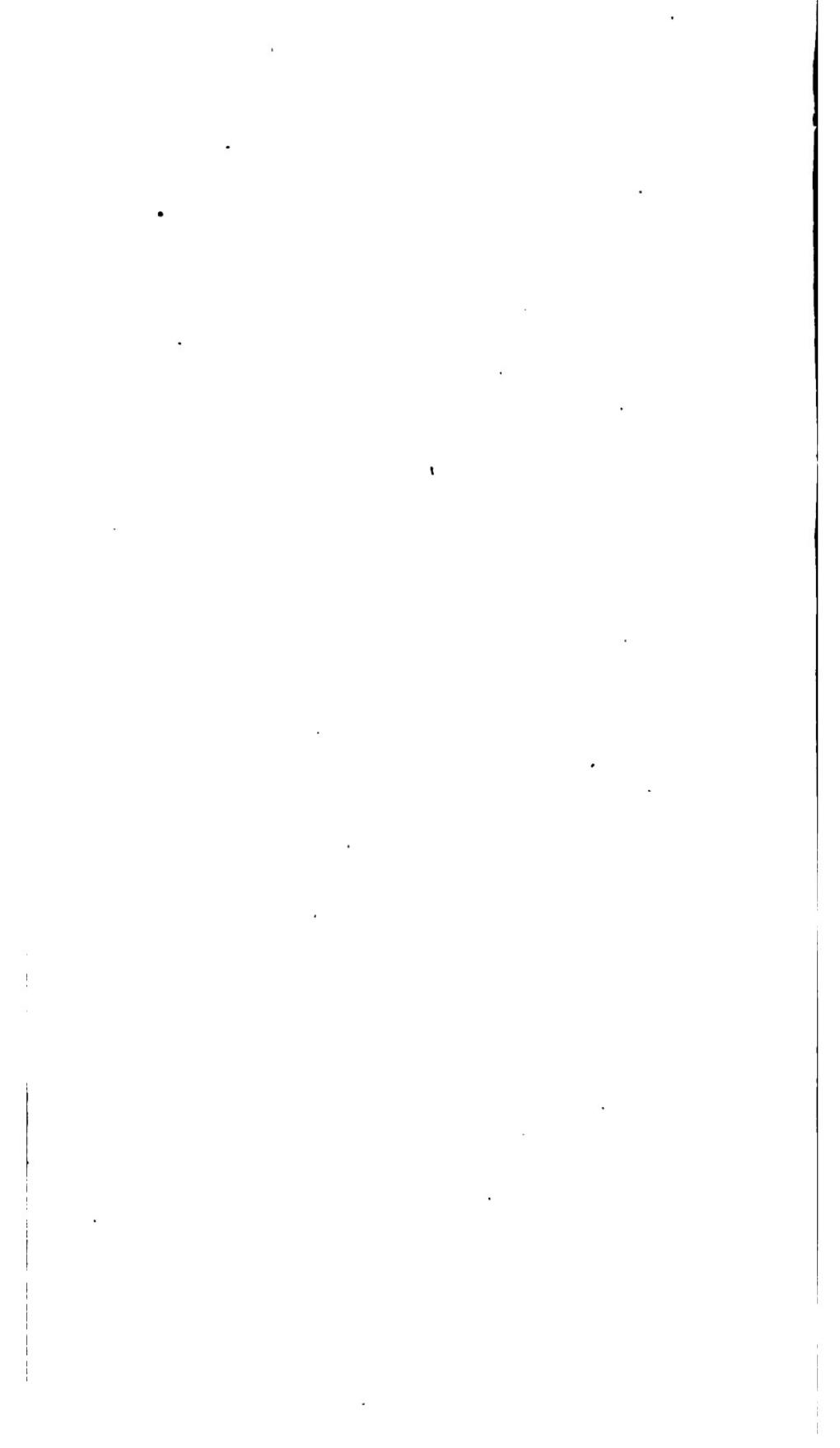
THE PROCEDURES UPON WRIT OF ENTRY, WHERE IT APPEARS that the defendant conveyed the disputed premises to a married woman, and took her note and mortgage back, the whole amounting to a single transaction, he is entitled to recover, the note and mortgage being void. *Newbegin v. Langley*, 612.

WRIT OF ERROR.

WRIT OF ERROR LIES TO ORDER AWARDING PEREMPTORY MANDAMUS by the superior court, though not a judgment at common law, under the provision of the Delaware constitution conferring on the court of errors and appeals "jurisdiction to issue writs of error to the superior court, and to determine finally all matters in error in the judgment and proceedings of said superior court," which for this purpose places the judgment and proceedings of that court on original and on other than the common-law grounds, and therefore extends the jurisdiction of the court by writ of error to judgments or decisions in any proceedings in the superior court of a final character. *Union Church of Africans v. Sanders*, 187.

WRITS.

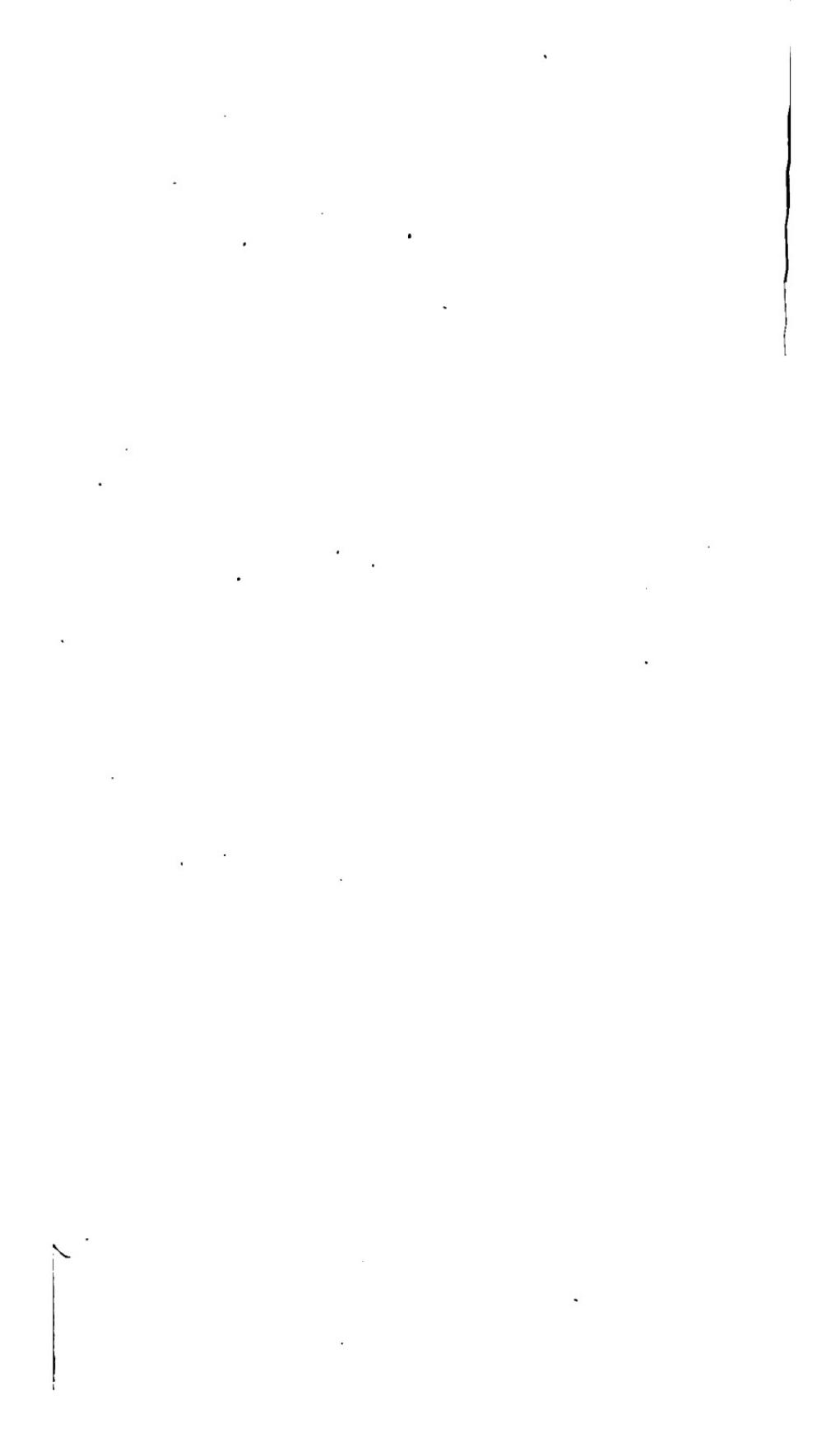
See MANDAMUS; SHERIFFS.



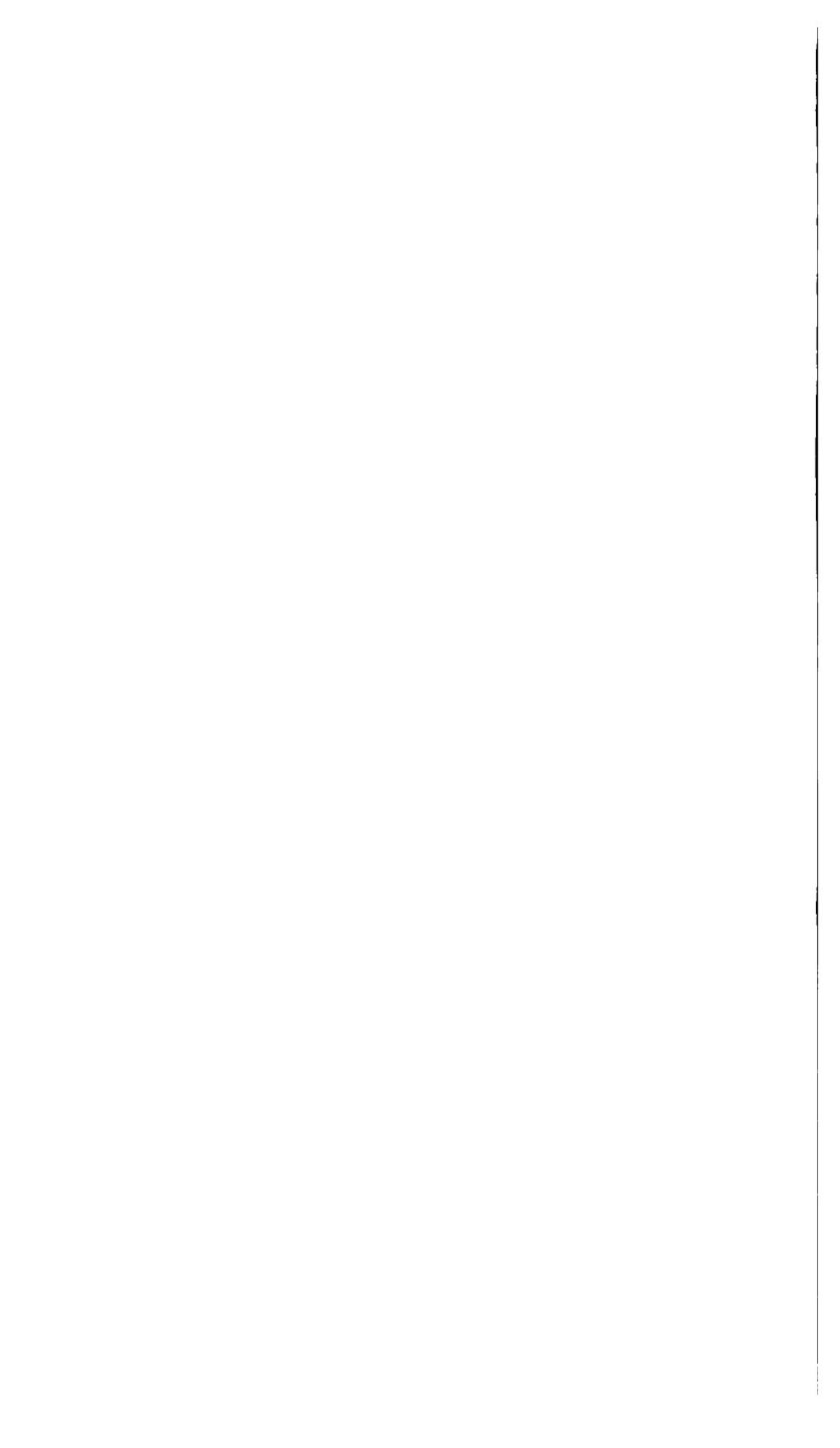


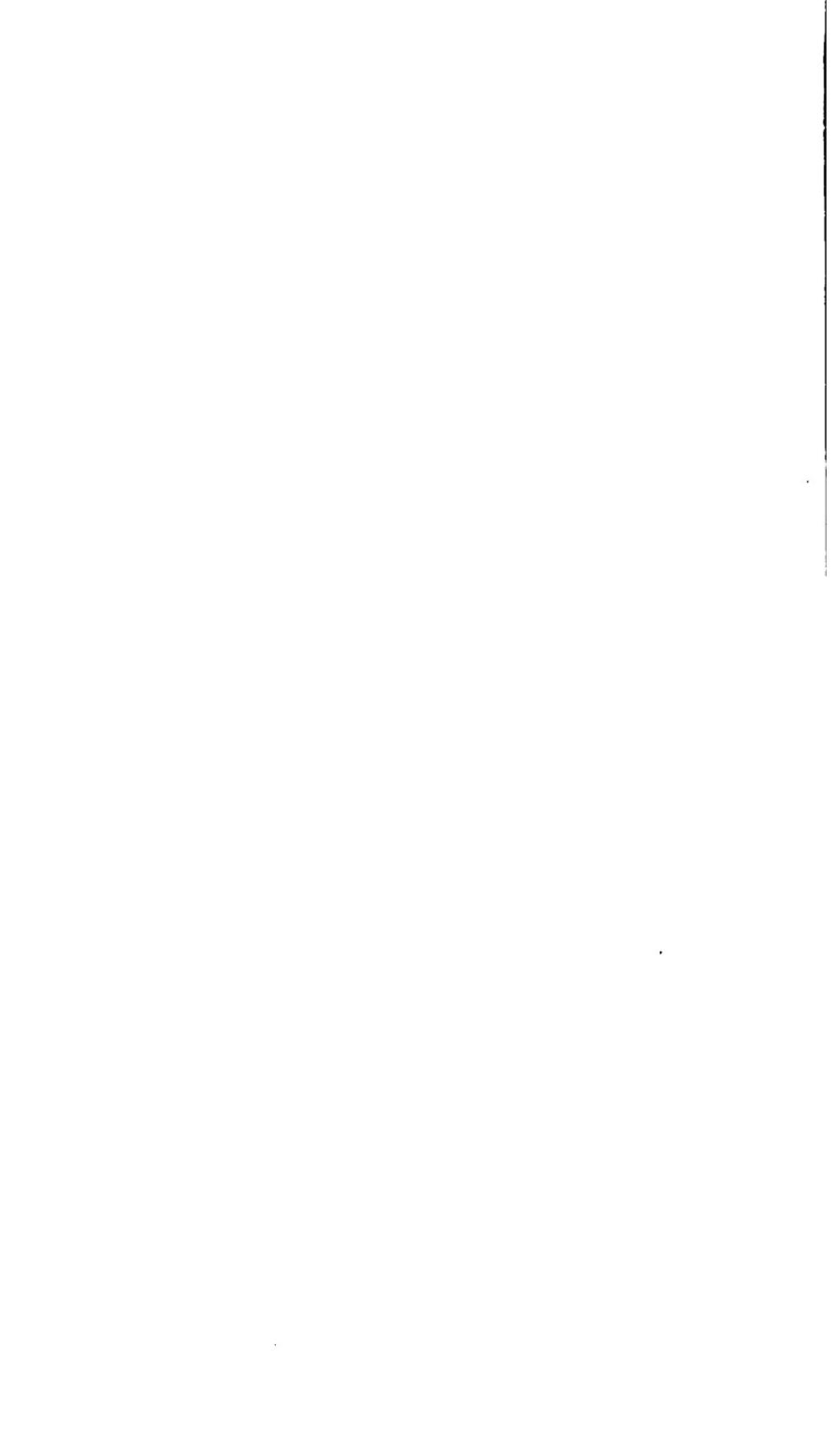
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